No. 96-511

(23)

Supreme Court, U.S.
FILED
FEB 20 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES, et al.,

Appellants,

—v.—

AMERICAN CIVIL LIBERTIES UNION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF BROADCASTERS; ABC, INC.; CBS INC.; AND NATIONAL BROADCASTING COMPANY, INC. IN SUPPORT OF APPELLEES

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 701-3000

Counsel for Amici Curiae

Of Counsel:

GAIL JOHNSTON
CAHILL GORDON & REINDEL
(a partnership including a
professional corporation)

February 20, 1997

(Additional Counsel Listed on Inside Cover)

BEST AVAILABLE COPY

112 pp

Henry L. Baumann
Steven A. Bookshester
Jack N. Goodman
National Association
of Broadcasters
1771 N. St., N.W.
Washington, D.C. 20036
*Counsel for National
Association of Broadcasters*

Alan N. Braverman
John Zucker
ABC, Inc.
77 West 66th Street
New York, New York 10023
Counsel for ABC, Inc.

Howard Jaeckel
Susanna M. Lowy
CBS Inc.
51 West 52nd Street
New York, New York 10019
Counsel for CBS Inc.

Jon Fine
Lynn Oberlander
National Broadcasting
Company, Inc.
30 Rockefeller Plaza
New York, New York 10112
*Counsel for National
Broadcasting Co., Inc.*

BEST AVAILABLE COPY

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
INTEREST OF AMICI CURIAE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	
"SPECTRUM SCARCITY" CAN NO LONGER SERVE AS A BASIS FOR AFFORDING DIMINISHED FIRST AMENDMENT PROTECTION TO BROADCASTERS	4
CONCLUSION	13
APPENDIX	1a

TABLE OF AUTHORITIES

Cases PAGE

Action for Children's Television v. *FCC*, 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 701 (1996) 9n, 11

American Civil Liberties Union v. *Reno*, 929 F. Supp. 824 (E.D. Pa.), *prob. juris. noted*, 117 S. Ct. 554 (1996) 12

Arkansas AFL-CIO v. *FCC*, 11 F.3d 1430 (8th Cir. 1993) (en banc) 10

Columbia Broadcasting System, Inc. v. *Democratic Nat'l Comm.*, 412 U.S. 94 (1973)..... 5

Denver Area Educ. Telecommunications Consortium, Inc. v. *FCC*, 116 S. Ct. 2374 (1996) 4, 5, 13n

FCC v. *League of Women Voters*, 468 U.S. 364 (1984).....6, 7, 10, 11

FCC v. *Pacifica Foundation*, 438 U.S. 726 (1978) 4, 12-13n

Meredith Corp. v. *FCC*, 809 F.2d 863 (1987)..... 7

Metromedia, Inc. v. *City of San Diego*, 453 U.S. 490 (1981) 4

Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974) 4

National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943) 4

R.A.V. v. *City of St. Paul*, 505 U.S. 377 (1992)..... 13n

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) .....*passim*

PAGE

Southeastern Promotions, Ltd. v. *Conrad*, 420 U.S. 546 (1975) 4

Telecommunications Research and Action Ctr. v. *FCC*, 801 F.2d 501 (D.C. Cir.), *reh'g denied*, 806 F.2d 1115 (1986), *cert. denied*, 482 U.S. 919 (1987) . 8, 8-9n

Time Warner Entertainment Co. v. *FCC*, __ F.3d. __, 1997 WL 47179 (D.C. Cir 1997)..... 11-12n

Turner Broadcasting System, Inc. v. *FCC*, 512 U.S. 622 (1994) 4, 5

Constitutional Provisions and Statutes

U.S. Const. amend. I .....*passim*

Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133..... 1

Rules

U.S. Sup. Ct. R. 37(3)(a)..... 1

Administrative Decisions

Arkansas AFL-CIO v. *Television Station KARK-TV*, 7 F.C.C.R. 541 (1992) 10

In re Complaint of Syracuse Peace Council, 99 F.C.C.2d 1389 (1984), *recon. denied*, 59 Rad. Reg. 2d (P&F) 179 (1985) 7

In re Complaint of Syracuse Peace Council, 2 F.C.C.R. 5043 (1987), *aff'd*, *Syracuse Peace Council* v. *FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990) .....*passim*

PAGE

Miscellaneous

Broadcasting & Cable Yearbook 1996 ..... 8n

Archibald Cox, *The Supreme Court, 1979 Term; Forward: Freedom of Expression in the Burger Court*, 94 Harv. L. Rev. 1 (1980) 13n

Inquiry into Section 73.190 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143 (1985) 9n

Lucas A. Powe, *American Broadcasting and the First Amendment* (1987) 13n

4 Ronald D. Rotunda & John E. Nowak, *A Treatise on Constitutional Law* (2d ed. 1992) 13n

Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) 13n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-511

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, et al.,

Appellants,

—v.—

AMERICAN CIVIL LIBERTIES UNION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF BROADCASTERS; ABC, INC.; CBS INC.; AND NATIONAL BROADCASTING COMPANY, INC. IN SUPPORT OF APPELLEES

PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of the National Association of Broadcasters; ABC, Inc.; CBS Inc.; and National Broadcasting Company, as *amici curiae* in support of affirmance of the preliminary injunction entered against enforcement of the criminal provisions of the Communications Decency Act of 1996, Pub. L. No. 104-104, 100 Stat. 133. Pursuant to Rule 37(3)(a) of the rules of this Court,

amici have obtained and filed the written consents of the parties to the filing of this brief.

The purpose of this brief is to address a single issue that may arise in the Court's analysis of the application of the First Amendment to the Internet. It is the level of First Amendment protection afforded to broadcasters—a topic frequently addressed by this Court in the past, but never dealt with in light of the most recent examination by and ruling of the Federal Communications Commission that bears directly on the issue. This brief deals with (and annexes) that ruling—the *Syracuse Peace Council* case[1]—and urges the Court that when it next addresses the issue (whether or not in this case), the spectrum scarcity rationale that has led to reduced First Amendment protection for television and radio broadcasters should be abandoned.

INTEREST OF AMICI CURIAE

The National Association of Broadcasters ("NAB"), a nonprofit incorporated association, is the leading trade association of television and radio stations and networks in the United States, and serves and represents the American broadcasting industry. ABC, Inc. ("ABC"); CBS Inc. ("CBS"); and National Broadcasting Company, Inc. ("NBC") each operate, directly or through their subsidiaries, national broadcast networks and are engaged, *inter alia*, in producing news, sports and entertainment programming and disseminating that programming to the public through their owned and affiliated broadcast stations throughout the country as well as through sites on the Internet. As a result, *amici* have a clear stake in any decision or statement by this Court that might affect the First Amendment status of broadcasters. In particular, NAB, ABC, CBS, and NBC are concerned that in the course of its

[1] *In re Complaint of Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987), *aff'd, Syracuse Peace Council* v. *FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

opinion in this case, the Court may repeat prior statements or legal conclusions about the supposed lesser level of First Amendment protection afforded to broadcasters without taking the Commission's most recent—and definitive—ruling into account which would require reexamination of those conclusions. For this reason and to support broad First Amendment protection for all speech, including speech via the Internet, NAB, ABC, CBS, and NBC submit this brief.

SUMMARY OF ARGUMENT

Almost thirty years ago, the Court held that broadcasters should receive a lesser degree of First Amendment protection than other speakers, based in large part on the then-existing technology. Since that time, the Court has acknowledged its willingness to reconsider its decision if it received a "signal" from Congress or the Federal Communications Commission ("FCC") that technological advances required revision of the system of broadcast regulation. In its ruling abandoning the Fairness Doctrine, the FCC sent that signal in the clearest and most unambiguous of terms. In the intervening decade, a technological explosion (of which the development of the Internet is but one part) has occurred which has weakened still further any notion that "spectrum scarcity" could justify diminished First Amendment protection for broadcasters. Now, as the Court embarks on its analysis of First Amendment protection on the Internet, *amici* urge the Court to refrain from relying on any generalized notion that broadcasters should receive a lesser form of First Amendment protection and to await a case in which the issue of the continued viability of the spectrum scarcity rationale is squarely presented before passing on that issue.

ARGUMENT

"SPECTRUM SCARCITY" CAN NO LONGER SERVE AS A BASIS FOR AFFORDING DIMINISHED FIRST AMENDMENT PROTECTION TO BROADCASTERS

This Court has often observed that different media receive different levels of First Amendment protection. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 557 (1975) ("Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."); *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 748 (1978) ("We have long recognized that each medium of expression presents special First Amendment problems."); *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 501 (1981) ("Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method.").

On the First Amendment continuum, courts have accorded the highest level of protection to newspapers and other print media. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). Broadcasters have received a lower level of protection, with cable television falling somewhere in the middle. *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622, 637 (1994) ("[O]ur cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media."); *Denver Area Educ. Telecommunications Consortium, Inc.* v. *FCC*, 116 S. Ct. 2374, 2401 (1996) (Souter, J., concurring) ("[W]e have found cable television different from broadcast with respect to the factors justifying intrusive access requirements. . . .").

The lower level of protection for broadcasters has its roots in the regulation of radio broadcasters in the 1920s and this Court's 1943 decision in *National Broadcasting Co.* v. *United States*, which cited the limited radio broadcast facilities available at the time as a justification for content-based regulation

of speech. 319 U.S. 190, 216-17 (1943). In 1969, the Court revisited the issue of broadcast scarcity in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), and upheld the so-called "Fairness Doctrine," grounding its decision on the limited number of outlets for communication available in "the present state of commercially acceptable technology." *Id.* at 388. However, even as the Court upheld the Fairness Doctrine, it indicated its willingness to reconsider the decision at a later date. *Id.* at 393. This openness to reexamine its ruling in light of changed technological developments is consistent with the Court's later observation that

> "[t]he problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." *Columbia Broadcasting System, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973).

A similar view was expressed recently by Justice Souter in his cautionary admonition in *Denver Area Educ. Telecommunications Consortium, supra*, that

> "because we know that changes in . . . regulated technologies will enormously alter the structure of regulation itself, we should be shy about saying the final word today about what will be accepted as reasonable tomorrow." 116 S. Ct. at 2402 (Souter, J., concurring).

In the nearly thirty years since *Red Lion*, the Court has continued to restate its holding, while often noting the existence of an extensive body of criticism of the scarcity rationale. In *Turner Broadcasting, supra,* the Court signaled its own unease with the scarcity rationale, stating that the "rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, *whatever its validity* in the cases elaborating it, does not apply in the context of cable regulation." 512 U.S. at 637 (emphasis added). The Court also

recognized that "courts and commentators have criticized the scarcity rationale since its inception," *id.* at 638, and cited to *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984). There, the Court observed that

> "[t]he prevailing rationale for broadcast regulation on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete." *Id.* at 376 n.11.

It then stated:

> "We are not prepared . . . to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *Id.*

Three years later, the Federal Communications Commission sent that signal. Stating, *inter alia*, that "the scarcity rationale . . . no longer justifies a different standard of First Amendment review for the electronic press," the Commission abandoned the Fairness Doctrine. *In re Complaint of Syracuse Peace Council*, *supra*, 2 F.C.C.R. at 5053; App. 61a. In its ruling, the Commission stated:

> "We . . . believe, as the Supreme Court indicated in *FCC* v. *League of Women Voters of California*, that the dramatic transformation in the telecommunications marketplace provides a basis for the Court to reconsider its application of diminished First Amendment protection to the electronic media." *Id.* at 5058; App. 89a.

The *Syracuse Peace Council* ruling was the culmination of years of proceedings over a Fairness Doctrine complaint lodged against a television station in Syracuse, New York. The dispute began in 1982 when station WVTH ran a series of

advertisements supporting the construction of the Nine Mile II nuclear power plant. Syracuse Peace Council complained to the FCC that the licensee of the station, Meredith Corporation, had failed to provide viewers with conflicting perspectives on the power plant and had thereby violated the Fairness Doctrine. The FCC initially agreed with the Syracuse Peace Council, 99 F.C.C.2d 1389 (1984), and later refused to address Meredith's constitutional defenses on its motion for reconsideration. 59 Rad. Reg. 2d (P&F) 179 (1985). On appeal, the District Court reversed and remanded, instructing the Commission to consider the station's constitutional defenses. *Meredith Corp.* v. *FCC*, 809 F.2d 863 (1987).

On remand, the Commission exhaustively reviewed the legal and factual predicates underlying both the Fairness Doctrine and the lower level of First Amendment protection accorded broadcasters. Because this issue has never been fully briefed to the Court and because the Commission's ruling was a direct response to this Court's invitation in *League of Women Voters*, we attach the Commission's entire ruling as an Appendix to this brief.

Certain passages of the ruling warrant the Court's particular attention. According to the Commission:

> "[T]he extraordinary technological advances that have been made in the electronic media since the 1969 *Red Lion* decision, together with a consideration of fundamental First Amendment principles, provide an ample basis for the Supreme Court to reconsider the premise or approach of its decision in *Red Lion*." 2 F.C.C.R. at 5048; App. 38a.

Writing in 1987, the Commission noted that the number of television stations had increased fifty-four percent since the *Red Lion* decision and that the number of radio stations had increased fifty-seven percent during that time. *Id.* at 5051; App. 54a. Furthermore,

> "[n]ot only has the number of television and radio stations increased the public's access to a multiplicity of

media outlets since 1969, but the advent and increased availability of such other technologies as cable and satellite television services have dramatically enhanced that access."[2] *Id.*; App. 54a.

The Commission rejected the scarcity rationale in its entirety, concluding that "[w]e do not believe that any scarcity rationale justifies differential First Amendment treatment of the print and broadcast media." *Id.* at 5054.; App. 67a. Citing Judge Bork's trenchant opinion in *Telecommunications Research and Action Ctr.* v. *FCC*, 801 F.2d 501 (D.C. Cir.), *reh'g denied*, 806 F.2d 1115 (1986), *cert. denied*, 482 U.S. 919 (1987), in which he criticized the scarcity rationale,[3] the Commission noted

> "that the limits on the number of persons who can use frequencies at any given time is not absolute, but is, in part, economic: greater expenditures on equipment and/or advances in technology could make it possible to utilize the spectrum more efficiently in order to permit a greater number of licensees. So the number of outlets in a market is potentially expandable, like the quantities of most other resources." *Id.* at 5045-55; App. 69a.

Summing up its position, the Commission stated: "[W]e simply believe that, in analyzing the appropriate First Amendment standard to be applied to the electronic press, the concept of scarcity—be it spectrum or numerical—is irrelevant." *Id.* at 5055; App. at 73a-74a. Accordingly,

> "we believe that an evaluation of First Amendment standards should not focus on the *physical differences* between the electronic press and the printed press, but on the *functional similarities* between these two media and upon the underlying values and goals of the First Amendment. We believe that the function of the electronic press in a free society is identical to that of the printed press and that, therefore, the constitutional analysis of government control of content should be no different." *Id.* at 5055; App. 74a.

The ultimate conclusion asserted in the Commission's *Syracuse Peace Council* ruling was unambiguous: "We believe that the *1985 Fairness Report*,[4] as reaffirmed and further elaborated on in today's action, provides the Supreme Court

---

[2] Since the time of *Syracuse Peace Council*, the number of media outlets has continued to increase. For example, from January 1988 to January 1996, the number of television stations on the air has increased from 1342 to 1544, and the number of radio stations on the air has increased from 10,244 to 12,001. *See Broadcasting & Cable Yearbook 1996* at B-671, C-244. Additionally, the revolution in computer-based communications in which "[a]s many as 40 million people in the world use the Internet today, and [which] is expected to grow to 200 million by 1999" has drastically increased the number of outlets for both speakers and listeners. Brief of United States at 28.

[3] According to Judge Bork:

> "[T]he line drawn between the print media and the broadcast media, resting as it does on the physical scarcity of the latter, is a distinction without a difference. Employing the scarcity concept as an analytic[al] tool . . . inevitably leads to strained reasoning and artificial results.
>
> "It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. Not everyone who wishes to publish a newspaper, or even a pamphlet, may do so. Since scarcity is a universal fact, it can hardly explain regulation in one context and not another." 801 F.2d at 508.

See also Action for Children's Television v. *FCC*, 58 F.3d 654, 675 (D.C. Cir. 1995) (Edwards, C.J., dissenting), *cert. denied*, 116 S. Ct. 701 (1996) ("In response to the economic scarcity argument—that there are more would-be broadcasters than spectrum frequencies available—economists argue that all resources are scarce in the sense that people often would like to use more than exists.").

[4] *Inquiry into Section 73.190 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143 (1985).

with the signal referred to in *League of Women Voters*." *Id.* at 5053; App. 65a. The Commission further stated that its ruling provided the Court

> "the basis on which to reconsider its application of constitutional principles that were developed for a telecommunications market that is markedly different from today's market. We further believe that the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press. Therefore, in response to the question raised by the Supreme Court in *League of Women Voters*, we believe that the standard applied in *Red Lion* should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press." *Id.*; App. 61a-62a.

In the decade since the Commission rejected the continuing viability of spectrum scarcity as a rationale for reduced First Amendment protection and consequently abandoned the Fairness Doctrine, that position has been reaffirmed by the Commission, *Arkansas AFL-CIO* v. *Television Station KARK-TV*, 7 F.C.C.R. 541, 542 (1992), and acknowledged by courts of appeal. For example, the Eighth Circuit noted that "In *Syracuse Peace Council*, the D.C. Circuit credited the FCC's testimony that the dramatic increase in media outlets since 1959 [sic] eliminated the need for the fairness doctrine." *Arkansas AFL-CIO* v. *FCC*, 11 F.3d 1430, 1442 (8th Cir. 1993) (en banc).

Chief Judge Richard S. Arnold, concurring in the same case, concluded:

> "The *Red Lion* holding . . . was premised on the scarcity of broadcast frequencies available for licensing, and the Court's opinion explicitly indicated that its view might change if more spectrum space became available, or if experience with the fairness doctrine indicated that it was reducing rather than enhancing the amount of information available to the public.
>
> "Developments since 1969 make it likely, in my view, that the holding of *Red Lion* would be reconsidered. For one thing, the FCC has given the 'signal' referred to in *League of Women Voters*, *supra*. The Commission has indicated both that the problem of spectrum scarcity is rapidly disappearing and that the fairness doctrine has had a chilling effect on the willingness of broadcast stations to cover controversial matters of public importance. Whether the Supreme Court reexamines *Red Lion* is its business, not ours. But developments subsequent to *Red Lion* appear at least to raise a significant possibility that the First Amendment balance struck in *Red Lion* would look different today." 11 F.3d at 1443 (Arnold, C.J., concurring) (citations omitted).

A similar view was expressed by Chief Justice Edwards of the D.C. Circuit in *Action for Children's Television*, *supra*, who noted:

> "Although the Supreme Court has not declared the distinction between broadcast and other media a dead one, it has not lately given the distinction an enthusiastic endorsement. In fact, in recent years the Court has only grudgingly upheld the distinction." 58 F.3d at 674 (Edwards, C.J., dissenting).

Judge Edwards concluded:

> "In my view, it is no longer responsible for courts to apply a reduced level of First Amendment protection for regulations imposed on broadcast based on an indefensible notion of spectrum scarcity. It is time to revisit this rationale."[5] *Id.* at 675.

---

[5] In a recent opinion of Judges Williams, Edwards, Silberman, Ginsburg and Sentelle (dissenting from a denial of rehearing *en banc* in a case involving the 1992 Cable Act's requirements with respect to direct

In the district court opinion below, Judge Dalzell reviewed the continuum of First Amendment protection accorded different media. *American Civil Liberties Union* v. *Reno*, 929 F. Supp. 824, 873-77 (E.D. Pa.), *prob. juris. noted*, 117 S. Ct. 554 (1996). In the course of this review, he stated that spectrum scarcity "allows the Government to regulate content even after it assigns a license." *Id.* at 874. Regrettably, his statement is an accurate articulation of the current state of First Amendment jurisprudence. *Amici* submit, however, that in light of *Syracuse Peace Council* and the explosive developments in the telecommunications area in the past decade, including the extraordinary development of the Internet, abandonment of the spectrum scarcity rationale may commend itself to this Court.

With that in mind, *amici* urge the Court to refrain in this action from relying on any generalized notion that broadcasters should receive some form of watered-down First Amendment protection. After all, *Red Lion* itself did not purport to offer a "final word" on anything; it was explicitly based on the then "present state of commercially acceptable technology," 395 U.S. at 388. So much has changed since then that we think it appropriate to urge the Court now to avoid any reassertion of a doctrine that is so subject to reassessment and of such dubious continuing validity.[6]

---

broadcast satellite), they noted that the continuing "intense criticism" of *Red Lion* stemmed partly from

> "the perception that the 'scarcity' rationale never made sense—in either its generic form (the idea that an excess of demand over supply at a price of zero justifies a unique First Amendment regime) or its special form (that broadcast channels are peculiarly rare)"

and partly from "the growing number of available broadcast channels." *Time Warner Entertainment Co.* v. *FCC*, __ F.3d. __, 1997 WL 47179 at *6 n.1 (D.C. Cir 1997) (Williams, J., dissenting).

[6] The only other basis that has been cited for affording broadcasters a lower level of protection than other speakers is the conclusion of the Court in *Pacifica*, *supra*, that the "uniquely pervasive" characteristics of radio justified differential constitutional treatment of indecent expression in that medium. 438 U.S. at 748. *Amici* will leave it to the parties to address the applicability of *Pacifica* to this case except to note:

(a) *Pacifica* itself may well have been based upon the very notion of spectrum scarcity addressed in this brief. *Compare Turner Broadcasting*, *supra*, 512 U.S. at 639 (rejecting broadcast rationale for cable because of "fundamental technological differences between broadcast and cable transmission") *with Denver Area Educ. Telecommunications Consortium*, *supra*, 116 S. Ct. at 2388 (plurality opinion) (applying broadcast rationale to cable re indecent programming because "cable and broadcast television differ little, if at all" as regards the viewer);

(b) the Court itself has noted that the plurality opinion in *Pacifica* "did not command a majority of the Court." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 390 n.6 (1992); and

(c) *Pacifica* has been the subject of such sustained criticism that it should, at the least, be revisited by the Court before its adoption by a majority of the Court as a basis for regulation of all media that enter the home—or any of them. *See, e.g.*, Lucas A. Powe, *American Broadcasting and the First Amendment*, 209-15 (1987) (criticizing decision as "puzzling," "troublesome" and "mystifying"); 4 Ronald D. Rotunda & John E. Nowak, *A Treatise on Constitutional Law*, § 20.18 at 102 (2d ed. 1992) (describing *Pacifica* as "a disquieting and significant departure from traditional first amendment theory"); Laurence H. Tribe, *American Constitutional Law* § 12-18 at 935-38 (2d ed. 1988) (criticizing *Pacifica*); Archibald Cox, *The Supreme Court, 1979 Term; Forward: Freedom of Expression in the Burger Court*, 94 Harv. L. Rev. 1, 45 (1980) (explaining *Pacifica* as "a narrow, highly particular decision pushing a number of doctrinal exceptions to first amendment principles to their limits because the exceptions conjoin").

CONCLUSION

The decision of the United States District Court for the Eastern District of Pennsylvania should be affirmed.

Dated: February 20, 1997

Respectfully submitted,

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 701-3000

Counsel for Amici Curiae

Of Counsel:

GAIL JOHNSTON
CAHILL GORDON & REINDEL
(a partnership including a
professional corporation)

Henry L. Baumann
Steven A. Bookshester
Jack N. Goodman
National Association
of Broadcasters
1771 N. St., N.W.
Washington, D.C. 20036
Counsel for National
Association of Broadcasters

Alan N. Braverman
John Zucker
ABC, Inc.
77 West 66th Street
New York, New York 10023
Counsel for ABC, Inc.

Howard Jaeckel
Susanna M. Lowy
CBS Inc.
51 West 52nd Street
New York, New York 10019
Counsel for CBS Inc.

Jon Fine
Lynn Oberlander
National Broadcasting
Company, Inc.
30 Rockefeller Plaza
New York, New York 10112
Counsel for National
Broadcasting Co., Inc.

APPENDIX

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FCC 87-266

In re Complaint of

SYRACUSE PEACE COUNCIL

—against—

TELEVISION STATION WTVH,
Syracuse, New York

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1987; Released August 6, 1987

By the Commission:

TABLE OF CONTENTS

	PARAGRAPH
I. INTRODUCTION	1
II. BACKGROUND	3
A. 1985 Fairness Report	3
B. History of this Proceeding	7
1. *Syracuse Peace Council v. Television Station WTVH*	7
2. *Meredith Corp. v. FCC*	11
3. Comments on Remand	13
III. DISCUSSION	17
A. Scope of this Proceeding—Procedural Issues	17
1. Discussion of Policy and Constitutional Issues	17
2. Consideration of the Doctrine on its Face	27
B. Constitutional Considerations Under *Red Lion*	36
1. *Red Lion Broadcasting v. FCC*	37
2. Application of the *Red Lion* Standard	39

	PARAGRAPH
(a) Chilling Effect of the Doctrine	42
(b) The Extent and Necessity of Government Intervention into Editorial Discretion	52
(c) Conclusion	58
C. Preferred Constitutional Approach	62
1. Basis for Reconsidering *Red Lion*	66
2. The Scarcity Rationale	73
3. Divergence of *Red Lion* from Traditional First Amendment Precepts	83
4. First Amendment Standard Applicable to the Press	95
IV. CONCLUSION	98

I. INTRODUCTION

1. In *Meredith Corp. v. FCC*,[1] the United States Court of Appeals remanded this case to the Commission for further consideration of our decision, in this adjudication, to enforce the fairness doctrine[2] against station

[1] 809 F.2d 863 (D.C. Cir. 1987).

[2] The fairness doctrine, as developed by the Commission, places a two part obligation upon broadcast licensees. First, broadcasters have an affirmative obligation to cover vitally important controversial issues of interest in their communities. Second, they are obligated to provide a reasonable opportunity for the presentation of contrasting viewpoints

WTVH.[3] The court found that the Commission, on the basis of the evidence of record, had properly concluded that the station failed to satisfy the requirements of the fairness doctrine. It determined, however, that the Commission had acted arbitrarily and capriciously in not considering WTVH's contentions that the enforcement of the doctrine deprived the station of its constitutional rights.

2. Pursuant to the court's Order, we reopened this proceeding in order to consider the constitutional and public interest issues raised by WTVH.[4] In light of "the general importance of the issues in this particular case,"[5] we pub-

on those controversial issues of public importance that are covered. *See, e.g., Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 110-11 (1973); *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 516 (D.C. Cir.), *pet. for reh. en banc denied*, 806 F.2d 111 (D.C. Cir. 1986), *cert. denied*, 55 U.S.L.W. 3821 (U.S. 1987) (*TRAC v. FCC*); *Fairness Report* in Docket No. 19260, 48 FCC 2d 1 (1974), *recon. denied*, 58 FCC 2d 691 (1976), *aff'd sub nom. National Citizens Committee for Broadcasting v. FCC*, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978) (*1974 Fairness Report*). The violation at issue in this case involved the second part of the fairness doctrine.

[3] *Syracuse Peace Council v. Television Station WTVH Syracuse, New York*, 99 FCC 2d 1389 (1984), *recon. denied*, FCC 85-571 (released Oct. 30, 1985), *remanded sub nom. Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987) (*Syracuse Peace Council v. Television Station WTVH*).

[4] Congress has instructed the Commission "to consider alternative means of administration and enforcement of the Fairness Doctrine and to report to the Congress by September 30, 1987." Making Continuing Appropriations for Fiscal Year 1987, Pub. L. No. 99-91, Title 5, 407, 100 Stat. 3341-66 (1986), initially assigned Pub. L. No. 99-500, Title 5, 407, 100 Stat. 1983-66) (1986). *See Inquiry Into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees* in MM Docket No. 87-26, FCC 87-67 (released Feb. 19, 1987), 52 Fed. Reg. 7626 (March 12, 1987). In compliance with this congressional directive, we have today adopted a "Report of the Commission" addressing these alternatives (*Fairness Alternatives Report*).

[5] *Syracuse Peace Council v. Television Station WTVH*, FCC 87-33 (released Jan. 23, 1987), 52 Fed. Reg. 2805-01, at 2 (Jan. 27, 1987) (*Order Requesting Comment*).

lished a notice in the Federal Register inviting comment from interested members of the public as well as from the parties to this adjudication. As explained more fully below, based upon this record, our experience in administering the fairness doctrine, fundamental constitutional principles, and the findings contained in our comprehensive *1985 Fairness Report*,[6] we conclude that the fairness doctrine, on its face, violates the First Amendment and contravenes the public interest. Accordingly, we shall grant reconsideration of our earlier determinations in this proceeding, and our previous orders in this proceeding are hereby vacated. Any formal determination that WTVH failed to comply with the requirements of the fairness doctrine can no longer be used against WTVH in any subsequent renewal proceedings or in any other context.[7]

II. BACKGROUND

A. 1985 FAIRNESS REPORT

3. As the Court noted in *Meredith Corp. v. FCC*, the Commission recently conducted "a comprehensive reexamination of the public policy and constitutional implications of the fair-

[6] *Inquiry Into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees* in Gen. Docket No. 84-282, 102 FCC 2d 145 (1985), *petition for review docketed sub nom. Radio-Television News Directors Association v. FCC*, No. 85-1691 (D.C. Cir. filed Oct. 22, 1985) (*1985 Fairness Report*). The findings contained in that *Report* are summarized *infra*, at 3-6.

[7] As noted above, the court in *Meredith Corp. v. FCC* held that the agency acted unlawfully in enforcing the fairness doctrine without considering whether this action was constitutional. It remanded the case to the Commission to consider the constitutional issues raised by Meredith, or, alternatively, to consider whether enforcement of the doctrine was contrary to public policy. There is no explicit language in the court's decision vacating or reversing the Commission's earlier orders, and consequently we believe that our previous orders determining that WTVH had violated the fairness doctrine and denying reconsideration of that determination remained in effect after the court's decision. We therefore vacate those orders in today's action.

ness doctrine."[8] During the course of that proceeding, the Commission considered more than one hundred formal comments and reply comments, hundreds of informal submissions, and oral arguments presented in two full days of hearings. The inquiry culminated in the *1985 Fairness Report* released by the Commission on August 23, 1985.[9] Because we believe that the determinations made in the *1985 Fairness Report* are directly relevant to the issues on remand, in this section we shall briefly summarize the major conclusions of that *Report* before describing the history of this proceeding.

4. Based upon compelling evidence of record, the Commission, in its *1985 Fairness Report*, concluded that the fairness doctrine disserved the public interest. Evaluating the explosive growth in the number and types of information sources available in the marketplace, the Commission found that the public has "access to a multitude of viewpoints without the need or danger of regulatory intervention."[10] The

[8] *Meredith v. FCC*, 809 F.2d at 868. *1985 Fairness Report*, *supra* note 6. Because " 'regulatory agencies do not establish rules of conduct to last forever,' " *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1982), quoting *American Trucking Association, Inc. v. Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397 (1967), the courts have recognized "the need, and indeed the responsibility, of the Commission to reevaluate its regulatory standards over time." *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1425 (D.C. Cir. 1983) (footnote omitted). *See Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 411 (D.C. Cir. 1983). Cognizant of this responsibility, throughout its history, the Commission has periodically reevaluated the fairness doctrine. *1985 Fairness Report*, *supra* note 6; *1974 Fairness Report*, *supra* note 2; *Editorializing by Broadcast Licensees* in Docket No. 8516, 13 FCC 1246 (1949) (*1949 Fairness Report*). The *1985 Fairness Report* is both the most recent and the most comprehensive reassessment of the doctrine conducted by the agency.

[9] *See supra* note 6. The Court of Appeals characterized the conclusions reached by the Commission in the *1985 Fairness Report* as "carefully documented and reasoned . . . ." *Meredith v. FCC*, 809 F.2d at 867.

[10] *1985 Fairness Report*, 102 FCC 2d at 224.

Commission also determined that the fairness doctrine "chills" speech, finding that "in stark contravention of its purpose, [the doctrine] operates as a pervasive and significant impediment to the broadcasting of controversial issues of public importance."[11] In addition, the agency found that its enforcement of the doctrine acts to inhibit the expression of unpopular opinion;[12] it places the government in the intrusive role of scrutinizing program content;[13] it creates the opportunity for abuse for partisan political purposes;[14] and it imposes unnecessary costs upon both broadcasters and the Commission.[15]

5. While disclaiming any intention to "definitively resolve whether or not the fairness doctrine is constitutional,"[16] the Commission questioned whether the doctrine is consistent with the guarantees of the First Amendment. It stated that "were the balance ours alone to strike, the fairness doctrine would thus fall short of promoting those interests necessary to uphold its constitutionality."[17] The Commission recognized that the Supreme Court in 1969 had upheld the doctrine in *Red Lion Broadcasting Co. v. FCC* (*Red Lion*),[18] but determined that the factual predicates underlying that decision had been eroded.[19]

[11] *Id.* at 169.

[12] *Id.* at 188-90.

[13] *Id.* at 190-92.

[14] *Id.* at 192-94.

[15] *Id.* at 194-96.

[16] *Id.* at 155.

[17] *Id.* at 156.

[18] 395 U.S. 367 (1969). The *Red Lion* decision is discussed more fully *infra*, at 37-38.

[19] The Commission determined that the constitutionality of the fairness doctrine was suspect under the traditional constitutional standard of review governing broadcast regulation enunicated in *Red Lion*. The Commission explained:

(*footnote continued*)

6. In the *1985 Fairness Report*, the Commission did not reach a definitive conclusion as to whether the doctrine was codified.[20] In light of the "intense Congressional interest in the fairness doctrine . . . the pendency of legislative proposals,"[21] as well as the uncertainty as to whether the doctrine was in fact codified, the Commission concluded that "it would be inappropriate at this time . . . to either eliminate or significantly restrict the scope of the doctrine."[22] Expressing its intention to continue to enforce the fairness doctrine, the Commission forwarded its *Report* to Congress so that the legislature would have "an opportunity to review the fairness doctrine in light of the evidence [in that *Report*]."[23]

B. HISTORY OF THIS PROCEEDING

1. *Syracuse Peace Council v. Television Station WTVH*

7. While the general inquiry on the fairness doctrine was still pending before the agency, the Commission in this adju-

> [W]e believe that the fairness doctrine can no longer be justified on the grounds that it is necessary to promote the First Amendment rights of the listening and viewing public. Indeed, the chilling effect on the presentation of controversial issues of public importance resulting from our regulatory policies affirmatively disserves the interest of the public in obtaining access to diverse viewpoints. In addition, we believe that the fairness doctrine, as a regulation which directly affects the content of speech aired over broadcast frequencies, significantly impairs the journalistic freedom of broadcasters.

1985 Fairness Report, 102 FCC 2d at 156.

20 *Id.* at 245. In *TRAC v. FCC*, *supra* note 2—a case decided after the Commission issued the *1985 Fairness Report*—the United States Court of Appeals determined that the fairness doctrine was not codified in Section 315 of the Communications Act. *See* 47 U.S.C. 315 (1982). The Supreme Court recently denied the petitions for certiorari in that case, 55 U.S.L.W. 3821 (U.S.1987), and consequently the decision in *TRAC v. FCC* is final.

21 *1985 Fairness Report*, 102 FCC 2d at 247.

22 *Id.* at 148.

23 *Id.*

dication held that television station WTVH in Syracuse, New York, had violated the doctrine.[24] The Commission determined that WTVH, by broadcasting a series of editorial advertisements advocating the construction of the Nine Mile Point II nuclear plant as a sound investment for New York, presented a controversial issue of public importance. Finding at that time that the station had failed to air any contrasting viewpoints on the issue, the Commission concluded that WTVH had not met its obligations under the fairness doctrine.

8. The Meredith Corporation, the licensee of station WTVH, petitioned the Commission to reconsider its decision.[25] Addressing the agency's administration of the doctrine, Meredith argued that the Commission had misapplied administrative precedent and had erred in determining that the station violated the fairness doctrine. Specifically, Meredith contended that the Commission had erred in determining that the issue was controversial at the time that the advertisements were broadcast. It also argued that the agency had acted incorrectly in framing the controversial issue of public importance. In addition, it asserted that the agency had improperly distinguished an earlier administrative decision—*Yes to Stop Calloway Committee*[26]—which, in its view, was "controlling" in this case. Finally, providing new evidence of additional programming, Meredith asserted that it had in fact aired balanced programming on the issue involved in this case.

9. In a supplement attached to its Reply,[27] Meredith advanced a number of legal arguments asserting that the fair-

24 *Syracuse Peace Council v. Television Station WTVH*, *supra* note 3.

25 "Petition for Reconsideration," filed by Meredith Corp., *Syracuse Peace Council v. Television Station WTVH* (Jan. 22, 1985).

26 98 FCC 2d 1317 (1984).

27 "Reply to Opposition to Petition for Reconsideration and Supplement," filed by Meredith Corp., *Syracuse Peace Council v. Television Station WTVH* (filed Apr. 12, 1985) at 12-19 (Meredith Reply). That

ness doctrine, as applied to the specific facts of the case *sub judice* and on its face, was unconstitutional. First, it contended that the Commission, by failing to follow the appropriate procedures governing the administration of the doctrine, applied the fairness doctrine in a manner which violated its constitutional rights.[28] Second, proferring quantitative data relating to the availability of broadcast stations, cable systems and newer technologies in Syracuse, New York, Meredith asserted that the assumptions of scarcity underlying the *Red Lion* decision are not present in the specific market in which WTVH operates.[29] Thus, while noting that "there may exist situations today wherein sufficient media outlets do not exist to ensure a multiplicity of both voices and viewpoints,"[30] Meredith asserted that the number and types of information sources in Syracuse, New York, demonstrate that the fairness doctrine is not constitutionally permissible in that market.[31] Third, Meredith stated that "the application of the fairness doctrine to WTVH's editorial decision to air the commercials [in this case] has had a distinct and chilling effect on its freedom of speech."[32] Fourth, Meredith contended that there was sufficient evidence in the Commission's pending

document is attached to the "Comments of Meredith Corp." filed Feb. 25, 1987 in the instant proceeding.

28 Meredith's first constitutional argument does not question the constitutionality of the fairness doctrine on its face; rather, it is narrowly limited in scope to the effect of the doctrine as applied to the facts of this case. This argument apparently relies on the assertion that the agency improperly substituted its determination of the issue addressed in the editorial advertisements for that of the broadcast station instead of assessing whether Meredith had exercised its reasonable judgment in determining the issue addressed.

29 *Id.* at 26. *See infra* note 88.

30 *Id.* at 26-27.

31 *Id.* at 26-31.

32 *Id.* at 22. *See id.* at 31-33. Meredith stated that the Commission's decision in this case that WTVH violated the fairness doctrine would "work[ ] a degree of self-censorship alluded to in *Red Lion*." *Id.* at 33.

fairness doctrine inquiry[33] demonstrating that "the scarcity rationale of *Red Lion* no longer exists"[34] for the agency "to reach the conclusion that, as a general matter, the Fairness Doctrine contravenes the First Amendment rights of broadcasters."[35] Thus, apparently questioning the legal and factual basis upon which the constitutionality of the fairness doctrine was upheld in *Red Lion*, Meredith asserted that "the Fairness Doctrine as a whole lacks constitutional validity today."[36]

10. In a *Memorandum Opinion and Order*, the Commission denied Meredith's petition for reconsideration.[37] Addressing in detail the nonconstitutional contentions raised by Meredith,[38] the Commission concluded that it had correctly found on the basis of the evidence before it that WTVH had violated

33 *See Inquiry into the General Fairness Doctrine Obligations of Broadcast Licensees* in Gen. Docket No. 84-282, FCC 84-140 (released May 8, 1984), 48 Fed. Reg. 20,317 (May 14, 1984). The fairness inquiry was pending at the time that Meredith made this argument.

34 Meredith Reply, at 26 n.29.

35 *Id.* In addition, Meredith took the position that the interest of the public in obtaining access to diverse viewpoints can be achieved by less intrusive means than the fairness doctrine. *Id.* at 33-35.

36 *Id.* at 41. *See id.* at 19-26. Finally, Meredith argued that the fairness doctrine lacks the requisite specificity required by the due process clause of the Fifth Amendment and thus is unconstitutionally vague. *Id.* at 35-38. *See* U.S. CONST. amend. V. In light of our conclusion that the doctrine deprives broadcasters of their First Amendment rights, we have no need to resolve whether it also violates the due process clause of the Fifth Amendment.

37 *Reconsideration Order*, *supra* note 3, at 9.

38 For example, the Commission determined that it was unreasonable for station WTVH to have concluded that there was no ongoing controversy of public importance on whether the Nine Mile II plant was a sound investment at the time the editorial advertisements were broadcast. *Id.* at 10-16. The Commission rejected Meredith's contention that it had improperly reframed the issue identified by the complainant (*id.* at 16 n.9), and found Meredith's reliance upon the *Yes to Stop Calloway Committee*, 98 FCC 2d 1317 (1984), to have been misplaced. *Reconsideration Order*, *supra* note 3, at 17.

the fairness doctrine.[39] The agency, however, did not reach the merits of Meredith's constitutional arguments. Citing the *1985 Fairness Report*, it stated that it had determined to continue to enforce the doctrine "irrespective of [its] view concerning the constitutionality of the Fairness Doctrine, [because] the question of its repeal or its constitutionality is best left to Congress and the courts."[40]

2. *Meredith Corp. v. FCC*

11. Meredith sought judicial review of the Commission's order in the United States Court of Appeals for the District of Columbia Circuit.[41] The Court on review rejected Meredith's contention that the Commission had misconstrued administrative precedent[42] or erred in determining that WTVH's actions did not satisfy the requirements of the fairness doctrine.[43] It asserted, however, that the Commission had acted

39 The Commission determined, however, that subsequent to the date of its initial ruling, Meredith had provided information that WTVH had in fact broadcast opposing views on this issue. The Commission concluded that this information "demonstrate[d] the licensee's good faith in complying with the Fairness Doctrine and show[ed] its intention to do so in the future." *Reconsideration Order*, *supra* note 3, at 20.

40 *Id.* at 9 n.4.

41 "Petition for Review," filed by Meredith Corp. in *Meredith Corp. v. FCC*, No. 85-1723 (D.C. Cir., filed October 31, 1985).

42 *Meredith Corp. v. FCC*, 809 F.2d at 870-71. In its opinion, the Court stated that it had "no doubt the Commission's application of its fairness precedent must be sustained. The FCC's opinion thoroughly explained its conclusions and persuasively distinguished the cases cited by [Meredith]." *Id.* at 871.

43 Before reaching the merits of the case, the Court addressed two procedural matters. First, the Court held that Meredith had standing because the Commission had made a formal determination that WTVH had violated the fairness doctrine. *Id.* at 868-69. Second, the Court rejected the argument that Section 405 of the Communications Act, 47 U.S.C. 405 (1982), precluded it from considering the constitutional issues because Meredith had raised these arguments for the first time in a supplemental pleading filed after the deadline for petitions for reconsideration. *Meredith Corp. v. FCC*, 809 F.2d at 869-70.

improperly in holding that Meredith violated the doctrine without responding to the broadcaster's constitutional arguments.[44] While noting that "[a]n agency is not required to reconsider the merits of a rule each time it seeks to apply it,"[45] the court stated that the Commission, in its *1985 Fairness Report*:

> has already largely undermined the legitimacy of its own rule. The FCC has issued a formal report that eviscerates the rationale for its existing regulations. The agency has deliberately cast grave legal doubt on the fairness doctrine . . . [in] a formal fashion.[46]

44 *Id.* at 872-73. The Court stated that "in a formal adjudication, an administrative agency is obliged to consider and respond to substantial arguments a respondent presents in its defense." *Id.* at 873 (citations omitted).

45 *Id.*

46 *Id.* The Court of Appeals concluded that, on remand, *avoiding the constitutional issue in this case* "appears clearly no longer available" to the agency. *Meredith Corp. v. FCC*, 809 F.2d at 873 n.11. The Court pointed out that it had recently determined, in *TRAC v. FCC*, *supra* note 2, that the fairness doctrine was not codified. In addition, the Court discussed the fact that Congress, subsequent to *TRAC v. FCC*, had enacted appropriations legislation which referred explicitly to the fairness doctrine both in the body of that statute and in its legislative history. *Meredith Corp. v. FCC*, 809 F.2d at 873 n.11. *See* Making Continuing Appropriations for Fiscal Year 1987, *supra* note 4, and H.R. Rep. No. 99-1005, 99th Cong., 2d Sess. 70-71 (1986). The court asserted that the actual language of the appropriations legislation "does not appear to mandate the fairness doctrine." *Meredith Corp. v. FCC*, 809 F.2d at 873 n.11. The court probed counsel for the Commission, at oral argument, as to whether the Commission could be bound by legislative intent, as expressed in report language and other legislative history, but not in actual legislation. In its decision, the court noted that counsel admitted that legislative history was not legally binding. Despite the fact that the court had before it legislative history indicating that at least some members of Congress did not want the Commission to act on the fairness doctrine, *see id.*, the court nevertheless remanded the proceedings and directed the Commission to consider the constitutional and public interest challenges to the fairness doctrine, demonstrating its determination

12. In remanding the case to the Commission for further consideration of Meredith's constitutional claims,[47] the Court provided the Commission with several options. It indicated that the Commission could address the constitutional issue broadly or "choose to decide the issue narrowly, resting on the particular circumstances of Meredith's case."[48] As a further alternative, the Court stated that the Commission could determine, "in an adjudicatory context, that the doctrine cannot be enforced because it is contrary to the public interest and thereby avoid the constitutional issue."[49] In any event, the

that the various expressions of congressional intent did not codify the doctrine nor justify continued delay in resolving petitioner's claim.

Subsequent to the court's decision in *Meredith Corp. v. FCC*, efforts have been made to codify the fairness doctrine. S. 742, 100th Cong., 1st Sess. (1987); H.R. 1934 (1987). *See* S. Rep. 100-34, 100th Cong., 1st Sess. (1987); H.R. Rep. No. 100-108, 100th Cong. 1st Sess. (1987). S. 742 was passed by the Senate on April 21, 1987, and H.R. 1934 was passed by the House of Representatives on June 3, 1987. The legislation, however, was vetoed by the President on June 19, 1987, 23 Weekly Comp. Pres. Doc. 715 (June 29, 1987), and on June 23, 1987, the Senate voted to return the bill to committee without attempting to override the veto. 133 Cong. Rec. S8438 (daily ed. June 23, 1987). Thus, to date, these efforts have not resulted in codification, and thus the fairness doctrine is not mandated by statute. Hence, this case does not involve the authority of the Commission to question the constitutionality of a statute.

Nearly seven months have passed since the Court of Appeals decided *Meredith Corp. v. FCC*, and the Commission has had adequate time to assess comments and to analyze the constitutional and public interest challenges thoroughly. In light of these facts, and in light of the court's clear directions in remanding this case, we believe that we can no longer justifiably delay our response to WTVH's claims. Any further delay in deference to Congress' continuing interest in fairness legislation would be inconsistent with our adjudicatory responsibilities, *Meredith Corp. v. FCC*, 809 F.2d at 873-74, and proper administrative procedure, *see Koniag, Inc. v. Andrus*, 580 F.2d 601 (D.C. Cir. 1978); *Pillsbury v. FTC*, 354 F.2d 952 (5th Cir. 1966).

47 *Id.* at 874.

48 *Id.* at 872.

49 *Id.* at 872 n.10.

court admonished the members of this Commission that the failure to consider Meredith's constitutional arguments in its defense was not only the "very paradigm of arbitrary and capricious administrative action," but may also have constituted a breach of the oath that each Commissioner took to support and defend the Constitution.[50] This case was therefore remanded for rectification, and we now consider it, in light of that admonition.

3. Comments on Remand

13. In view of the importance and potentially far-ranging impact of our decision on remand, we invited interested persons, through publication of a notice in the Federal Register, to submit comments on "whether, in light of the 1985 Fairness Report, enforcement of the fairness doctrine is constitutional and whether enforcement of the doctrine is contrary to the public interest."[51] On remand, approximately fifty comments were filed by individuals, broadcasters, advertisers, public interest groups, trade associations, governmental entities and others.[52] The comments were approximately equally divided between those who support and those who oppose the fairness doctrine.[53]

50 *Id.* at 874.

51 *Order Requesting Comment*, *supra* note 5, at 2.

52 A list of the commenting parties is contained in Appendix A.

53 The American Civil Liberties Union (ACLU) and the Safe Energy Communication Council (SECC) each filed a motion requesting the Commission to accept their late-filed comments. "Motion for Leave to File Comments Out-of Time," filed by American Civil Liberties Union, *Syracuse Peace Council against Television Station WTVH* (Mar. 3, 1987); "Motion for Leave to Submit Late-Filed Comments," filed by Safe Energy Communication Council, *Syracuse Peace Council against Television Station WTVH* (Mar. 5, 1987). ACLU stated that it was unable to submit its comments in a timely manner because it was involved in other substantial litigation. SECC asserted that a substantial amount of its draft comments was lost due to a computer malfunction, thereby preventing it from filing its comments within the prescribed deadline. Because both the ACLU and the SECC have shown good cause for the

14. A number of fairness doctrine advocates argue that the Commission should not consider either the propriety or the constitutionality of the doctrine in this adjudication. For example, certain proponents, including the New York State Consumer Protection Board (New York) and the Office of the United Church of Christ *et al.* (UCC), argue that the agency lacks the authority to abolish the fairness doctrine in an adjudicatory proceeding because, in their view, it is an agency rule which cannot be altered except through notice and comment rulemaking procedures. The Syracuse Peace Council (SPC) contends that the agency, on remand, should find, as a factual matter, that Meredith Corporation did not violate the fairness doctrine, and thus the Commission could avoid resolution of any general policy or constitutional issues. In addition, certain commenters suggest alternative proceedings or approaches to the consideration of the issues on remand. For example, a number of parties request the Commission variously to institute a rulemaking on the fairness doctrine, to combine this adjudication with the proceeding addressing alternative enforcement policies for the fairness doctrine, or to defer consideration of this proceeding until after the alternatives proceeding is concluded or until the Supreme Court has disposed of the petitions for certiorari in *TRAC v. FCC*.[54]

15. If the agency decides the case on the merits, some fairness doctrine proponents state that the Commission should limit its consideration to the narrow facts presented in this adjudication. Arguing that the facts of this case are different from the typical fairness doctrine case because, *inter alia*, the controversial issue was presented in the context of an edito-

Commission to accept their late-filed comments, we shall grant their motions.

[54] The Democratic National Committee *et al.* (DNC) urge the Commission to defer resolution of the issues on remand until after the Supreme Court determines whether to grant certiorari in *TRAC v. FCC*. On June 8, 1987, the Supreme Court denied the petition for certiorari in *TRAC v. FCC*, and accordingly that request is now moot. *See* 55 U.S.L.W. 3821 (U.S. 1987).

rial advertisement, SPC and others contend that this adjudication is an inappropriate vehicle for the Commission to undertake a comprehensive evaluation of the doctrine on its face. In addition, a number of fairness doctrine proponents assert, as a general matter, that the doctrine is necessary to assure access by the public to diverse viewpoints on controversial issues. On the constitutional issue, they contend that because there are more persons who wish to broadcast than there are frequencies available, the "scarcity rationale" underlying the *Red Lion* decision still exists. Relying upon *Red Lion*, they argue that the fairness doctrine is constitutional.

16. In contrast, many parties opposing the fairness doctrine, including the American Advertising Federation, the National Broadcasting Co., Inc. (NBC), and the National Association of Broadcasters (NAB), urge the Commission, in this adjudication, to decide expeditiously whether the doctrine furthers the public interest and comports with the First Amendment. Relying upon the findings contained in the *1985 Fairness Report*, the American Association of Advertising Agencies, the Landmark Legal Foundation, the Freedom of Expression Foundation and others note that that there has been a substantial increase in the number and types of information services. They conclude that there is no scarcity of information sources justifying governmental intervention into the content of speech. NBC and others contend that fairness doctrine enforcement requires the government to make decisions concerning the content of programming that are fraught with judgmental uncertainty. Asserting that the effect of the doctrine is to inhibit the expression of views on controversial issues of public importance, a number of commenters state that there is no justification for the doctrine as a matter of policy. In addition, many commenters for the same reasons conclude that the doctrine violates the First Amendment rights of broadcasters. As a consequence, they state that it would be improper for the Commission to continue to enforce the doctrine and urge the agency to take whatever action is necessary to eliminate it.

III. DISCUSSION

A. SCOPE OF THIS PROCEEDING—PROCEDURAL ISSUES

1. Discussion of Policy and Constitutional Issues

17. SPC asserts that the Commission should avoid considering the policy or constitutional issues on remand entirely by resolving this case on the narrow factual issue concerning whether Meredith had violated the fairness doctrine.[55] Specifically, SPC urges us to grant Meredith's Petition for Reconsideration and to vacate our earlier decision upholding the validity of SPC's own complaint on the grounds Meredith had

[55] SPC notes that it had filed an objection to Meredith's Supplement in the reconsideration proceeding. It contends that the agency never considered its procedural objections to the acceptance of Meredith's Supplement in this adjudication. Renewing its request that the Commission strike Meredith's Supplement on procedural grounds, it asserts that the issue as to whether that document should be accepted "is again properly before the Commission." SPC Comments at 10. We disagree. In *Meredith Corp. v. FCC*, the court stated that:

> Clearly . . . the Commission had discretion to grant Meredith leave to present its constitutional argument. *And in its opinion on reconsideration, the Commission exercised that discretion, declining to bar Meredith's constitutional argument on procedural grounds—implicitly waiving the timeliness objection.*

809 F.2d at 869 (emphasis added). The court did not question the lawfulness of the agency's waiver. To the contrary, it held that the Commission erred in failing to address the constitutional issues raised by Meredith in its Supplement. An essential and necessary ingredient of this holding is that the arguments contained in the Supplement were properly before the agency. Contrary to SPC's suggestion, we are not free on remand to reconsider the propriety of this waiver. While SPC correctly notes that the court stated that "the Commission within its discretion *could have* denied Meredith leave to file because of procedural defects" (SPC Comments at 12, quoting *Meredith Corp. v. FCC*, 809 F.2d at 869 n.6 (emphasis added)), it fails to recognize that the Commission on reconsideration declined to exercise this discretion. We do not believe that there is anything in the court's statement to suggest that the court intended to permit the agency to revisit this issue on remand. In any event, if we were free to consider this issue, we would find that good cause exists to exercise our discretion to accept Meredith's Supplement.

in fact complied with the fairness doctrine by providing responsive programming.[56]

18. We reject SPC's request. The argument that Meredith had in fact satisfied its fairness doctrine obligations by presenting both sides of the controversial issue in question was presented to the court in *Meredith Corp. v. FCC*. Nonetheless, the court expressly affirmed our earlier finding that station WTVH had violated the doctrine.[57] The affirmance of this aspect of the case is final, and we have no power to revisit this determination. It is well-established that:

> [t]he decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority. The latter 'is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of [the] court deciding the case. . . .'[58]

[56] The Court of Appeals, in *Meredith Corp. v. FCC*, held that we erred by failing to consider the constitutional issues raised by Meredith. By arguing that we should avoid consideration of the constitutional issues on remand, SPC, in essence, is asking us to make the same mistake again.

[57] The court specified that "the Commission's application of fairness doctrine precedent must be sustained." *Meredith Corp. v. FCC*, 809 F.2d at 871. SPC, as intervenor in *Meredith Corp. v. FCC*, at that time took the position, in contrast to that which it now takes, that "the FCC correctly applied the fairness doctrine precedent to the facts of this case." Brief of Intervenor Syracuse Peace Council, *Meredith Corp. v. FCC*, (D.C. Cir. No. 85-1723) at 28 (filed Aug. 19, 1986).

[58] *City of Cleveland, Ohio v. FPC*, 561 F.2d 344, 346 (D.C. Cir. 1977), quoting *Yablonski v. United Mine Workers*, 454 F.2d 1036, 1038-39 (D.C. Cir. 1971). *See Louisiana Land and Exploration Co. v. FERC*, 788 F.2d 1132, 1137 (5th Cir. 1986) *See generally Consumers Union of United States, Inc. v. FTC*, 801 F.2d 417, 421-22 (D.C. Cir. 1986) (Scalia, J.). "The basic doctrine that, until reversed the dictates of a Court of Appeals must be adhered to by those subject to the appellate court's jurisdiction applies . . . [to the] rule respecting the law of the case. Administrative agencies are no more free to ignore this doctrine than are district courts." *Beverly Enterprises, Inc. v. NLRB*, 727 F.2d 591, 594 (6th Cir. 1984) (citations omitted).

"The prior appellate review and determination of [a fairness doctrine violation] . . . foreclose the opportunity to redetermine th[at] issue [ ]."[59] SPC would have the Commission on remand revisit issues definitively decided by the Court of Appeals for the apparent purpose of avoiding the policy and constitutional issues which the court specifically directed us to consider. Such an approach would contravene the court's decision in *Meredith Corp. v. FCC*, and we decline to adopt it.[60]

---

59 *Stewart Warner Corp. v. City of Potomac, Michigan*, 767 F.2d 1563, 1568 (Fed. Cir. 1985).

60 Arguing that the issues in this adjudication and those in the alternatives proceeding (*see supra* note 4) are interrelated, the DNC urges the Commission to consolidate this proceeding with the proceeding addressing fairness doctrine alternatives. It states further that it:

> continue[s] to believe that no modification of the Fairness Doctrine is necessary on either policy or constitutional grounds. If the Commission is committed to proceeding, however, the only viable approach would be for it to make a good-faith effort to explicitly formulate, consider and act upon alternative proposals by expeditiously issuing a Notice of Proposed Rulemaking proposing the adoption of specific alternatives, while simultaneously suspending activities in the *Meredith* docket.

DNC Comments at 6. We will not adopt DNC's proposal. In *Meredith Corp. v. FCC*, 809 F.2d at 873 n.11, the court expressly recognized that the agency was under a legislative mandate to consider alternative means of administration and enforcement of the doctrine, but did not suggest that the two proceedings were inextricably interrelated. Nor did the court intimate that the agency should suspend consideration of the issues on remand pending completion of the alternatives proceeding. We note, however, that former Chairman Fowler did tell members of Congress that we would not decide this case on remand before concluding the alternatives report. Rather, he told them, we would decide this case at either the same meeting that we adopt the alternatives report or at a subsequent meeting. *Departments of State, Justice, Commerce, the Judiciary, and Related Agencies for Fiscal Year 1988 Budget Estimates: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 100th Cong., 1st Sess. (Feb. 18, 1987) (testimony of Chairman Fowler); *see also Departments of Commerce, Justice, and State, the Judiciary,*

19. Therefore, in this *Memorandum Opinion and Order*,[61] we consider whether the fairness doctrine is consistent with

---

and Related Agencies Appropriations for 1988: Hearings Before a Subcomm. of the House Comm. on Appropriations, 100th Cong., 1st Sess. 642 (1987) (testimony of Chairman Fowler). As noted above, *supra* note 4, we have complied with that representation by today adopting and submitting the report requested by Congress. We have concluded in that report that it would not further the public interest to institute a rulemaking to consider the promulgation of agency rules on fairness doctrine alternatives. As a consequence, we do not believe that a suspension of this proceeding is warranted. *See infra* note 87. Furthermore, we note that the only issue before us in *this* proceeding is the continued viability of the fairness doctrine *as it is currently administered*. Consideration of this issue does not necessitate any additional evaluation of alternative policies.

61 Certain parties argue that the Commission lacks authority to conduct this proceeding because the Court of Appeals, in *Meredith Corp. v. FCC*, had not formally issued the mandate remanding the case to the Commission at the time the Commission invited comments on this proceeding. *E.g.*, "Comments of Syracuse Peace Council," filed Feb. 25, 1987, at 3-4 (SPC Comments); "Comments of Democratic National Committee *et al.*," filed Feb. 25, 1987, at 2 (DNC Comments).

We reject this technical argument. The courts have long recognized that the "concept of an indivisible jurisdiction which must be all in one tribunal or all in the other may fit other statutory schemes, but not that of the Communications Act." *Wrather-Alverez Broadcasting v. FCC*, 248 F.2d 646, 649 (D.C. Cir. 1957). *See* 47 U.S.C. 405 (1982); *see also United States v. Benmar Transport & Leasing Corp.*, 444 U.S. 4 (1957); *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 541 (1970). Indeed, it is not uncommon for both the Commission and the appellate courts concurrently to exercise jurisdiction over the same proceeding. In *Containerfreight Corp. v. United States*, 752 F.2d 419 (9th Cir. 1985), the court rejected an allegation, similar to the one presented in this proceeding, that the Interstate Commerce Commission had improperly reopened a proceeding prior to the issuance of a judicial mandate. Stating that its remand decision "plainly invited the Commission to solicit additional evidence," the court held that the remand proceedings had been "lawfully conducted." *Id.* at 427. The court pointed out that the Commission's action was "simply to get on with the business of complying" with the court's remand decision. *Id.* Similarly, the *Order Requesting Comments*, "far from being inconsistent with [the Court's] decision in [*Meredith Corp. v. FCC*], was invited by it." *Id.* Similarly, in this case, the only action taken by the Commission

the guarantees of the First Amendment and whether it comports with the public interest. As noted above, the court ordered the Commission to consider Meredith's constitutional arguments unless it decided, on policy grounds, not to enforce the fairness doctrine. As we began to examine the policy issues, however, it became evident to us that the policy and constitutional considerations in this matter are inextricably intertwined and that it would be difficult, if not impossible, to isolate the policy considerations from the constitutional aspects underlying the doctrine.[62] We believe, as a result, that

---

before the mandate issued was to invite comments, which was completely consistent with the court's instructions. Further, in subsequent pleadings filed with the court, we informed the court of our *Order Requesting Comments*, "Opposition to Motion for Stay of Mandate," filed by Federal Communications Comm'n, No. 85-1723 (Feb. 17, 1987), at 2 n.2, and, having received no indication to the contrary, we have no basis to conclude that our *Order Requesting Comments* was inappropriately issued.

In any event, on April 10, 1987, the Court of Appeals issued its mandate. As a consequence, the contentions that the Commission lacks jurisdiction to issue any substantive orders prior to the issuance of the mandate are moot.

[62] Our decision to analyze the constitutional and policy issues separately in the *1985 Fairness Report* was out of an abundance of caution not to overstep our appropriate role in this matter. At that time, the uncertainty as to the fairness doctrine's codification, together with Congress' intense interest in the issue, led us to question the propriety of reaching a conclusion on the constitutionality of the doctrine. *See 1985 Fairness Report*, 102 FCC 2d at 155-56. Furthermore, as noted earlier in this proceeding, we believed that the resolution of the constitutional issues was better left to Congress and the courts. *See Reconsideration Order*, *supra* note 3, at 5 n.4. Consequently, our analysis in the *1985 Fairness Report* focused on a policy perspective so as not to run afoul of these concerns. We believe, however, as we reiterate today, that our analysis of the fairness doctrine in 1985 was in fact informed and driven by First Amendment principles, and with the uncertainty of the doctrine's codification removed, *TRAC v. FCC*, *supra* note 2, and the *Meredith* court's directive to consider the constitutional issues, *Meredith Corp. v. FCC*, *supra* note 1, we believe that it is now incumbent upon us to consider the doctrine in terms of the inextricable constitutional issues on which the policy rests.

it is appropriate and necessary to address the policy and constitutional issues together for a number of reasons.[63]

20. First, in an analysis of any Commission regulation, it is well-established that First Amendment considerations are an integral component of the public interest standard. For example, in *FCC v. National Citizens Committee for Broadcasting*,[64] the Supreme Court stated that

> the " 'public interest' standard necessarily invites reference to First Amendment principles,' " *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973), and, in particular, to the First Amendment goal of achieving "the widest possible dissemination of information from diverse and antagonistic sources," *Associated Press v. United States*, 326 U.S. 1, 20 (1945).[65]

A meaningful assessment of the propriety of the doctrine, therefore, necessarily includes an evaluation of its constitutionality. If the doctrine impedes the realization of First Amendment objectives—and, as explained more fully

---

[63] Certain parties have continued to argue that the Commission lacks jurisdiction to consider the policy or constitutional implications of the fairness doctrine on the grounds that the doctrine is mandated by statute. As noted *supra*, at note 46, the court in *Meredith Corp. v. FCC*, expressly stated that the Commission could not determine, on remand, that the fairness doctrine is statutory. Indeed, the court pointed out that the argument that the doctrine had been codified by Section 315 of the Communications Act had already been rejected by the court in *TRAC v. FCC*, *supra* note 2. Therefore, in conformance with the court's express directive in *Meredith v. FCC*, we shall not consider the arguments raised by the comments that the doctrine is statutory and, consequently, that the agency lacks jurisdiction to question either its propriety or its constitutionality.

[64] 436 U.S. 775 (1978).

[65] 436 U.S. at 775. *See also American Security Council Education Foundation v. FCC*, 607 F.2d 438, 443 n.12 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980).

below, we believe that it does—*a fortiori* it disserves the public interest.

21. A second, but related, reason that the policy and constitutional issues are inextricably intertwined is that the promotion of First Amendment values was the Commission's core policy objective in establishing and maintaining the doctrine.[66] The parameters defining the need and desirability of government intervention under the fairness doctrine are coextensive with those of the First Amendment. Therefore, if the doctrine fails to further First Amendment principles, or if it strays from those parameters established by the Constitution, it necessarily follows that the doctrine does not achieve the specific purpose for which it was intended and can no longer be sustained.[67]

22. Third, this Commission was established by Congress as the expert agency in broadcast matters and possesses more than fifty years of experience with the day-to-day implementation of communications regulation. As a consequence, the courts, when considering the constitutionality of broadcast regulation, have found our perspective informative. For example, the Supreme Court has stated that "in evaluating . . . First Amendment claims . . . we must afford great weight to the decisions of Congress and the experience of the Com-

---

66 In our *1974 Fairness Report*, we asserted that there was a symmetry of purpose between the fairness doctrine and the First Amendment:

> The purpose and foundation of the fairness doctrine is . . . that of the First Amendment itself: "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . ."

48 FCC 2d at 6, quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 390. *See also 1949 Fairness Report*, 13 FCC at 262-63.

67 Conversely, as we noted in the *1985 Fairness Report*, "the same factors which demonstrate that the fairness doctrine is no longer appropriate as a matter of policy also suggest that the doctrine may no longer be permissible as a matter of constitutional law." 102 FCC 2d at 147-48.

mission . . . ."[68] Further, the Court of Appeals, in remanding this case to the Commission, affirmatively stated that it "may well benefit—in the event of further review—from the Commission's analysis [of the constitutional issue]."[69] Accordingly, we consider the constitutional and policy issues raised in this proceeding as being derived from the same set of principles.

23. We reject the contention of those parties who argue that we cannot address the broad policy and constitutional issues involving the fairness doctrine in this proceeding, but must issue an additional rulemaking notice to do so.[70] In *Meredith Corp. v. FCC*, the Court explicitly stated that the Commission could decide this case on broad policy and constitutional grounds.[71] The contention, then, that the Commission lacks authority to consider these issues in this adjudication is directly at odds with the directive of the Court of Appeals in remanding this case to the agency.

24. It is well-established, moreover, that "administrative agencies have wide leeway in choosing to announce rules and intepretations in the course of adjudications."[72] The courts

---

68 *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 102. *See FCC v. League of Women Voters of California*, 468 U.S. 364, 376 n.11 (1984).

69 *Meredith Corp. v. FCC*, 809 F.2d at 872.

70 *E.g.*, "Comments of Office of Communication of the United Church of Christ, Communication Commission, National Council of Churches, Henry Geller and Donna Lampert" at 2-4 (Feb. 12, 1987) (UCC Comments); "Comments of the New York State Consumer Protection Board" at 2-4 (Feb. 24, 1987) (New York Comments); "Comments of the American Civil Liberties Union" at 2 n.1 (March 2, 1987) (ACLU Comments).

71 *Meredith Corp. v. FCC*, 809 F.2d at 872.

72 *International Union, United Automobile, Aereospace & Agricultural Implement Workers of America v. Brock*, 783 F.2d 237, 246 (D.C. Cir.1986). Indeed, the Supreme Court has stated that an administrative agency "is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and

have duly recognized that "the choice whether to proceed by rulemaking or adjudication is primarily one for the agency regardless of whether the decision may affect agency policy and have general prospective application."[73] While acknowledging this long established rule of administrative law,[74] certain parties nonetheless contend that the Commission's discretion in selecting the type of proceeding in which to consider its policies would be abused were the Commission to address the broad constitutional and policy issues in this adjudication.[75] We disagree. Even if this case only involved a situation in which the agency decided on its own motion to reevaluate in an adjudication the propriety and the constitutionality of the fairness doctrine, this course of action would be lawful. The courts permit the Commission to reassess administrative precedent in adjudications even where the regulatory policy is of long standing and has far reaching

adjudication lies in the first instance within the [agency's] discretion." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). *See SEC v. Chenery*, 332 U.S. 194, 203 (1947), quoting Columbia Broadcasting System v. United States, 316 U.S. 407, 421 (1942) (And the choice made between proceeding by general rule or by individual *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.).

73 *Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976) (FCC had discretion in reversing an administrative interpretation involving the "equal time" provisions of Section 315 of the Communications Act by adjudication).

74 *See, e.g.*, ACLU Comments at 2, n.1.; SPC Comments at 17-18.

75 Because this adjudication does not involve certain issues which are present in some fairness doctrine cases, *e.g.*, noncommercial programming, the first prong of the doctrine, ballot questions, election-related issues, the political editorial rules or the personal attack rules, SPC contends that it would be an abuse of our discretion to address the general policy and constitutional issues in this adjudication. *See* SPC Comments at 17. To the extent that SPC challenges our ability to review the parent fairness doctrine in this adjudication involving its application in a particular context, we do not accept this argument. *See supra* 27-35. Because this decision will serve as precedent in future cases, we need not—and do not—decide here what effect today's ruling will have on every conceivable application of the fairness doctrine.

effect.[76] In any event, the agency reopened this proceeding pursuant to an express judicial directive to consider the lawfulness of enforcing the fairness doctrine against station WTVH, provided explicit notice of the matters at issue, and solicited comment from all interested parties. It can hardly be an abuse of discretion for an agency to comply with an order of the Court of Appeals by addressing on remand the precise issues contemplated by that court.

25. We also reject the contention that we are barred from considering the propriety of the fairness doctrine because it is an agency rule which can not be modified or eliminated except through the notice and comment procedures prescribed in Section 4 of the Administrative Procedure Act (APA).[77] The fairness doctrine was never promulgated as an agency regulation pursuant to a notice and comment rulemaking process. Rather, it was developed over a period of time[78] through statements of policy (without notice and comment) and case-by-case adjudications. The first fairness doctrine obligations were imposed by the FCC and its predecessor, the Federal Radio Commission, in early adjudicatory proceedings.[79] The policy was clarified and further developed in subsequent adjudications and in reports issued by the Commission in 1949 and 1974.[80] The fairness doctrine was established, with-

76 *Chisholm v. FCC*, 538 F.2d at 364-65.

77 5 U.S.C. 553 (1982).

78 As we stated in the *1985 Fairness Report*, "the genesis of the fairness doctrine reveals an evolutionary process, spanning over a considerable period of time." *1985 Fairness Report*, 102 FCC 2d at 146.

79 *E.g.*, *Great Lakes Broadcasting Co.*, 3 FRC 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930); *Young People's Association for the Propagation of the Gospel*, 6 FCC 178 (1938); *Mayflower Broadcasting Corp.*, 8 FCC 333 (1941).

80 *1949 Fairness Report*, *supra* note 8; *1974 Fairness Report*, *supra* note 2. For a history of the fairness doctrine, *see Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees* in Gen. Docket No. 84-282 (*Notice of Inquiry*), FCC 84-282 (released May 8, 1984); 49 Fed. Reg. 20,317 (May 14, 1984) at 9-24.

out notice and comment, and there is no requirement that it now be modified or eliminated through notice and comment rulemaking.[81]

26. Contrary to the contentions of parties such as the Office of Communications of the United Church of Christ, the fact that the fairness doctrine is referred to in Section 73.1910 of our rules[82] does not mean that it can be altered or eliminated only by means of a notice and comment rulemaking. The ref-

---

81 We note, however, that, in any event, we opened the record in this very proceeding to accept comments from interested persons (whether or not parties to the proceeding) as to the appropriate course of action for us to take following the *Meredith Corp. v. FCC* decision. *Order Requesting Comment*, *supra* note 5. We believe that, in light of the *Order Requesting Comment*, the *1985 Fairness Report* (the culmination of a proceeding in which interested persons had ample opportunity to participate, *see supra* 3), and the *Meredith* case itself, interested persons had adequate notice and opportunity to comment on a proceeding that would obviously consider, and possibly rule on, the constitutionality of the fairness doctrine even if notice and comment were required. Indeed, a substantial number of commenters in this proceeding addressed the constitutional issues raised by this case. We see little difference between a Section 553 notice and comment rulemaking and the procedures followed in this adjudication. Therefore, even were notice and comment rulemaking procedures prescribed by the APA, this proceeding is comparable to the situation in *Chisholm v. FCC*, in which the Court of Appeals stated that it:

> see[s] no advantage to be gained in this instance by requiring the Commission to proceed via the formalities of rulemaking rather than through adjudication. Petitioners . . . all submitted lengthy comments to the Commission . . . . [T]he issues were fully aired before the Commission, which had the benefit of all arguments raised before this court. It is therefore difficult to see how requiring the Commission to go through the motions of notice and comment rulemaking at this point would in any way improve the quality of the information available to the Commission or change its decision. The only result would be delay while the Commission accomplished the same objective under a different label. Such empty formality is not required where the record demonstrates that the agency in fact has had the benefit of petitioners' comments. § 538 F.2d at 365.

82 47 C.F.R. 73.1910 (1986).

erence to the fairness doctrine was incorporated in the Code of Federal Regulations in 1978.[83] The Commission, without extensive analysis, had concluded at that time that the doctrine was codified by Section 315 of the Communications Act. Section 73.1910, which was adopted without notice and comment as part of an omnibus procedural restructuring of the broadcast rules, is a simple statement setting forth what the Commission erroneously perceived to be required by Section 315.[84] Specifically, in adopting Section 73.1910, the Commission stated that:

> The new rule simply states that the Fairness Doctrine is in Section 315(a) of the Communications Act, directs the rule user to the FCC public notice, "Fairness Doctrine and the Public Interest Standard," . . . and includes information on obtaining copies of this document from the FCC.[85]

Its adoption did not effectuate any change in broadcasters' obligations under the fairness doctrine. The Court of Appeals decision in *TRAC v. FCC* that the fairness doctrine is not codified in Section 315 renders Section 73.1910 of our rules meaningless, and it consequently has no relevance to the issues addressed in this proceeding.

---

83 *Reregulation of Radio and Television Broadcasting*, FCC 78-681 (released Oct. 16, 1978), 43 Fed. Reg. 45,842 (Oct. 4, 1978).

84 In its entirely, Section 73.1910 states that:

> The Fairness Doctrine is contained in section 315 of the Communications Act of 1934, as amended, which provides that broadcasters have certain obligations to afford reasonable opportunity for the discussion of conflicting views on issues of public importance. *See* FCC public notice "Fairness Doctrine and the Public Interest Standards," 39 FR 26372. Copies may be obtained from the FCC upon request. § 47 C.F.R. 73.1910 (1986).

85 *Reregulation of Radio and Television Broadcasting*, 43 Fed. Reg. at 45,843.

2. Consideration of the Doctrine on its Face

27. After reviewing Meredith's several arguments in its defense,[86] we are persuaded by its argument that the fairness doctrine is unconstitutional on its face. We, therefore, do not—and, as explained below, cannot—confine our determination of the issues involved here to the specific facts of this adjudication. We do not believe that the constitutionality or the propriety of our holding that WTVH violated the fairness doctrine turns narrowly upon either the specific manner in which we have enforced the doctrine in this instance[87] or upon

---

86 *See supra* 9.

87 Although Meredith challenged the constitutionality of the doctrine on its face, it alternatively asserted that the method in which we administered the doctrine in this case was unconstitutional. *See supra* 9. For two reasons, the constitutional determination herein shall not rest upon a narrow, "as applied" basis. First, Meredith's argument is premised upon the alleged failure of the Commission to follow the established procedures governing the enforcement of the fairness doctrine. Both the Commission on reconsideration and the Court of Appeals on review have already squarely rejected that argument. Second, we believe that the infringement on broadcasters' constitutional rights resulting from the application of the doctrine cannot be cured simply by a purportedly less intrusive enforcement mechanism. As we stated in the *1985 Fairness Report*:

> [W]e have enforced the doctrine with a view toward minimizing editorial intrusion on broadcast journalists. But the record in this proceeding has convinced us that the fairness doctrine generally operates to inhibit the presentation of controversial issues of public importance on the airwaves. Because the inhibiting effect is an inevitable result of the substantive rule itself, even carefully crafted implementing mechanisms have not been successful in preventing the fairness doctrine from operating to deter broadcasters from airing important and controversial issues.

102 FCC 2d at 184 (footnote omitted). In the *Fairness Alternatives Report*, *supra* note 4, we evaluated a number of proposals concerning alternative means of enforcing the fairness doctrine. In that *Report*, we reaffirmed our earlier determination that less intrusive enforcement of the existing fairness doctrine would not eliminate the "chilling effect" of the fairness doctrine, but determined that certain alternatives to the

any unique circumstances in the particular geographic market in which we have applied it.[88] Rather, we believe, as more fully discussed below, that the doctrine's infirmity of impermissibly chilling and reducing the discussion of controversial issues of public importance is not an infirmity resulting from the enforcement of the doctrine in this particular case or in particular markets, but is an infirmity that goes to the very heart of the enforcement of the fairness doctrine as a general matter. We believe that the relevant issue in this proceeding is whether the doctrine itself complies with the strictures of the First Amendment and thereby comports with sound public policy. Therefore, in order to resolve the issues that the Court directed us to consider, we conclude that we have no choice but to consider Meredith's challenge to the facial validity of the fairness doctrine itself.[89]

---

fairness doctrine were nevertheless preferable to the existing doctrine. *See supra* note 60.

88 In its Reply, Meredith described the multiplicity of information sources available to listeners and viewers in Syracuse, New York. Although we believe, as discussed below, that the explosive growth in the number and types of information sources available to the public in the years since the Supreme Court's decision in *Red Lion* reinforces that the doctrine is unconstitutional, *see infra* 55-57, we believe that this is a factor, present in all markets, that makes the doctrine unconstitutional as a general matter. Further, neither this growth nor the actual number and types of information sources themselves have a bearing on the unconstitutional chilling effect that we have identified from the enforcement of the doctrine. Our concern for this chilling effect crosses all geographic and economic markets—from the largest to the smallest. Indeed, our concern is especially compelling in the smaller markets, where a chill would seriously deprive the public in those markets of access to robust, uninhibited debates on issues of public importance. The fact that the fairness doctrine is unconstitutional because it chills speech cannot change based on the size of the market in which the chill occurs. Therefore, we see no reason to limit our decision to the enforcement of the fairness doctrine in particular markets.

89 In remanding the case to the Commission for consideration of the constitutional issue, the court, in *Meredith Corp. v. FCC*, had left it to the Commission to determine whether the constitutional issue could be dealt with "narrowly, resting on the particular circumstances of Meredith's case," or whether it ought to be dealt with "more broadly." 809 F.2d at 872.

28. We also believe that there are cogent reasons why we must consider the broad policy and constitutional issues in this adjudication.[90] The particular broadcast at issue in this adjudication involved the broadcast of an editorial advertisement,[91] which triggered our enforcement of the fairness doctrine as expressed more particularly through the *Cullman* doctrine.[92] Although, at first blush, it appears that our decision could be limited to such announcements and to the continued vitality of the *Cullman* doctrine, closer scrutiny reveals that the policies involved cannot be segregated on any principled basis, so that such an approach is untenable.

---

90 As the Court in *Meredith Corp. v. FCC* noted, the *1985 Fairness Report* casts doubt upon the continued lawfulness of the fairness doctrine. 809 F.2d at 873. By resolving the issues in this proceeding broadly, we will remove the uncertainty that currently exists concerning the propriety and the constitutionality of the doctrine.

91 The purpose of editorial advertising—like the advertisement in *New York Times v. Sullivan*, 376 U.S. 476 (1957)—is to disseminate opinions on important public issues rather than to carry out commercial transactions. Therefore, in its objective, editorial advertising is identical to the other types of broadcast speech on important, controversial issues that implicate the fairness doctrine. It is, in essence, political speech and not merely commercial speech, thereby deserving of the protections accorded to the former and not the latter category of speech under the First Amendment. *Compare id.*; *Consolidated Edison v. Public Service Comm'n*, 447 U.S. 530 (1980) (political speech); *with Central Hudson Gas v. Public Service Comm'n*, 447 U.S. 557 (1980) (commercial speech); *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976) (commercial speech).

We note that the type of editorial advertisement at issue in this and other *Cullman* doctrine proceedings should be distinguished from paid political advertisements, the broadcast of which would constitute a "use" within the meaning of 47 U.S.C. §§ 312(a)(7) and 315 and thereby trigger the particular obligations enumerated in the statute. Our decision herein focuses only on the group of obligations that comprise the fairness doctrine, which are separate and distinct from the obligations imposed by 47 U.S.C. §§ 312(a)(7) & 315. The latter obligations are thus not at issue in this proceeding.

92 *Cullman Broadcasting Co.*, 25 RR 895 (1963).

29. The *Cullman* doctrine developed from a particular application of the fairness doctrine in *Cullman Broadcasting Co.*[93] The *Cullman* case clarified that the fairness doctrine applies to a broadcaster's airing of an editorial advertisement that presents for the first time one side of a controversial issue of public importance, thereby requiring the broadcaster to afford a reasonable presentation of contrasting viewpoints on that issue. Under the *Cullman* doctrine, if a broadcaster does not intend to present contrasting viewpoints through its own programming and cannot obtain paid sponsorship for the presentation of such viewpoints, then it cannot refuse to broadcast a presentation of those viewpoints (otherwise suitable to the licensee) on the ground that it cannot obtain paid sponsorship for that presentation.[94] The *Cullman* doctrine is, in reality, no more than a statement that the fairness doctrine must be complied with regardless of the availability of paying program sponsors,[95] and, as explained more fully below,

---

93 25 RR 895 (1963).

94 *Id.* at 897.

95 Indeed, in the *Cullman* case itself, the Commission considered its holding to be an application of the fairness doctrine when it said: "We hope that the views set forth above will be helpful in determining the requirements of the 'fairness doctrine' with respect to controversial issues such as this one." *Id.* at 897. We also note that, in the *Red Lion* decision, the Supreme Court cited to the *Cullman* doctrine as only one element of a collection of principles that comprise the fairness doctrine. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 377-78.

The *Cullman* doctrine has been criticized on the grounds that it requires broadcasters to present balanced *programming* as a result of issues and viewpoints presented through *advertisements*. Such advertisements, according to critics, are not properly considered part of broadcasters' programming, since they are prepared by individual private interests and are not the product of broadcasters' editorial discretion. Additionally, critics argue that broadcasters should be held responsible under the fairness doctrine only for the programming that they produce. Although these arguments identify problems associated with the enforcement of the *Cullman* doctrine, they do not serve to distinguish the *Cullman* doctrine from the fairness doctrine. Rather, *Cullman* is consistent with the fairness doctrine's focus on broadcasters' *overall* programming and the exercise of their discretion in accepting editorial advertisements

its infirmity stems from the very heart of the fairness doctrine—*i.e.*, its threat of government intrusion into the editorial process to ensure that broadcasters provide balanced programming in connection with their airing of editorial advertisements inhibits broadcasters from accepting such advertisements.[96] Thus, the *Cullman* doctrine can neither be logically nor materially distinguished from the core of the fairness doctrine itself.

30. For example, the fact that the *Cullman* doctrine requires the broadcaster to broadcast unsponsored presentations of contrasting viewpoints if it cannot obtain sponsored presentations of such viewpoints does not distinguish it from its parent fairness doctrine. The presentation of one side of any controversial issue of public importance is generally financed either directly by the actual speaker, through an editorial advertisement (a *Cullman* scenario), or by the broadcaster, through the station's commercial advertisement revenues (a general fairness scenario). If the broadcaster cannot obtain financing for the presentation of contrasting viewpoints on a particular issue from the sale of another editorial advertisement to another speaker, then the broadcaster must finance the presentation of such viewpoints using its own commercial advertisement revenues. In either event, the regulatory and economic burdens on the broadcaster are the same; and nothing distinguishes the *Cullman* doctrine from the fairness doctrine in this context.[97]

---

as part of their overall programming. As such, it is properly viewed as the product of the fairness doctrine itself.

96 *See infra* 48.

97 We note that the enforcement of the *Cullman* doctrine, in practice, results in the misimpression by many broadcasters that the doctrine requires them to counter paid editorial advertisements with unpaid advertisements if they are unable to obtain paid advertisements to present opposing viewpoints. Although the doctrine only requires broadcasters to present such viewpoints in their overall programming, many broadcasters may believe that it is easier to defend themselves against potential fairness doctrine complaints by demonstrating that they presented opposing viewpoints through other editorial advertisements.

(*footnote continued*)

31. Finally, *Cullman* obligations arise, just as general fairness obligations arise, only when the editorial advertisement involves a controversial issue of public importance. Hence, just like other programming that does not involve such issues, an editorial advertisement that does not involve a controversial issue of public importance does not give rise to any obligation to present contrasting viewpoints. Consequently, it becomes clear that the *Cullman* doctrine derives its life blood from the fairness doctrine, and its continued vitality cannot be considered without a concomitant assessment of the underlying fairness doctrine. Therefore, we believe that, because the constitutional and public interest infirmity of the *Cullman* doctrine derives from the underlying fairness doctrine, it would be arbitrary and capricious for us to consider the *Cullman* doctrine in this proceeding, without also addressing the fairness doctrine that stands as its base.

32. In short, broadcasters are faced daily with editorial decisions concerning what types of commercial or noncommercial material on controversial public issues to present to their listeners and viewers. The fundamental issue embodied in this fairness doctrine litigation is the same as that pre-

---

Indeed, the record developed in the *1985 Fairness Report* indicates that, in some instances, the advocates of those opposing viewpoints perpetuate this misimpression by insisting that broadcasters air opposing viewpoints through such advertisements, threatening to complain to the Commission if broadcasters fail to do so. *See 1985 Fairness Report*, 102 FCC 2d at 174-78 (specifically citing the effect of the *Cullman* doctrine on the coverage of such public issues as beverage deposit legislation and smoking legislation).

In other contexts, the Supreme Court has specifically rejected as contrary to the First Amendment the proposition that government may regulate speech for the purpose of equalizing the voices of those with differing financial resources. *Buckley v. Valeo*, 424 U.S. 1, 49 (1974). This, however, has been the practical effect of the policy here in question, as is well illustrated by the facts of this case. To respond to the *paid* spot advertisements of the Energy Association of New York, WTVH provided the Environmental Defense Fund and the Syracuse Peace Council with 103 *free* spots to provide contrasting views. *Reconsideration Order*, *supra* note 3, at 19.

sented in all other fairness doctrine cases: whether it is constitutional and thereby sound public policy for a government agency to oversee editorial decisions of broadcast journalists concerning the broadcast of controversial issues of public importance. Because the case before us is a product of the fairness doctrine itself, and because it raises important policy and constitutional issues common to all fairness doctrine litigation, we do not believe that the resolution of this proceeding turns on any specific facts that are unique to this adjudication.

33. Nor do we believe that it would be appropriate, in passing on the constitutional and policy issues raised by our enforcement of the fairness doctrine, to limit our consideration of such issues to the one part of the fairness doctrine that we determined had been violated in this case. The fairness doctrine, although consisting of two parts,[98] is a unified doctrine; without both parts, the doctrine loses its identity. The litigants and courts in this and, indeed, the *Red Lion* case have all considered the validity of the doctrine as a whole, and not as two separate policies. They have considered the doctrine as such because neither part of the doctrine, standing separately, constitutes the fairness doctrine, for both parts of the doctrine are interdependent and integral to the overall regulatory scheme.[99] Consequently, if the constitutional infirmity

[98] *See supra* note 2.

[99] In 1949, the Commission attempted to articulate in a single concept what had previously been a generic notion of "fairness": "the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community by the particular station." *1949 Fairness Report*, 13 FCC at 1249. By developing the fairness doctrine, then, the Commission sought to impose two obligations with respect to the coverage of controversial issues and the presentation of contrasting viewpoints in order to fulfill one policy goal. The doctrine, for example, would not, by its own terms, achieve its purpose if it only required broadcasters to cover controversial issues of vital importance to their communities (the first part), for it would not also ensure that contrasting viewpoints on those issues would also be covered. Conversely, simply requiring broadcasters, when covering controversial issues of public importance, to provide reasonable coverage of contrasting viewpoints (the second part) would not achieve the purpose of the doctrine, because broadcasters could avoid this obligation altogether by simply refusing to cover controversial issues of public importance. Because each part of the doctrine gives life to the other, we find the two parts to be inextricably linked to constitute what is currently known as the fairness doctrine.

of the doctrine arises from the enforcement of one of its parts, we do not believe it appropriate to sever that part of the doctrine and to continue enforcing only the other part.[100]

34. Yet even if we were to sever the two prongs of the doctrine and consider and invalidate only that prong which was violated in this case, we would be left with something very different from the fairness doctrine. The first part of the fairness doctrine, by itself, although subject to a different regulatory focus and enforcement mechanism, may be compared to the already existing obligation of broadcasters to cover issues of importance to their communities.[101] Accordingly,

[100] When considering this issue in the context of statutes, courts look to the overall statutory scheme in determining whether the constitutionally infirm portion of the statute may be severed from the remaining portion. If the infirm portion is integral to the overall scheme, then the entire statute must fall, regardless of whether the rest of the statute, taken separately, would still be constitutional. *Compare EEOC v. Allstate Ins. Co.*, 570 F. Supp. 1224 (S.D. Miss. 1983), *appeal dism'd*, 467 U.S. 1232 (1984) (legislative veto not severable from statutory scheme), *with INS v. Chadha*, 462 U.S. 919 (1983) (legislative veto severable from statutory scheme). Similarly, we believe that if our enforcement of the second prong of the fairness doctrine against Meredith was unconstitutional, then the entire doctrine must fall, for the second prong, as stated above, is integral to the overall regulatory scheme and cannot, therefore, be severed.

[101] *See Report and Order* in MM Docket No. 83-670, 98 FCC 2d 1076, 1091-92 (1984), *recon. denied*, 104 FCC 2d 358 (1986), *remanded on other grounds sub nom., Action for Children's Television v. FCC*, No. 86-1425 (D.C. Cir. June 26, 1987) [*Television Deregulation*]; *Report and Order* in BC Docket No. 79-219, 84 FCC 2d 968, 977 (1981), *recon. denied*, 87 FCC 2d 797 (1981), *rev'd on other grounds sub nom., Office of Communications of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983) [*Radio Deregulation*]. We note that, because such obligations are different and do not lie within the fairness doctrine, they are not at issue in this proceeding.

retaining both obligations would be duplicative. There is thus no need to sever the two parts of the existing fairness doctrine in order to retain the obligation imposed by the first part.

35. In remanding this case to us, the Court of Appeals did not indicate that we were obligated to consider, or even that we should consider, the two parts of the doctrine separately, and, as stated above, we do not believe that we are otherwise obligated to do so. Our directive from the court was to consider the constitutionality and propriety of the fairness doctrine as it is currently administered. That doctrine, both on its face and as administered, contains two parts that, together, constitute the fairness doctrine. Accordingly, we consider the entire doctrine in this proceeding and decline to sever its parts from one another.

B. CONSTITUTIONAL CONSIDERATIONS UNDER *RED LION*

36. As more fully discussed below, the extraordinary technological advances that have been made in the electronic media since the 1969 *Red Lion* decision, together with a consideration of fundamental First Amendment principles, provide an ample basis for the Supreme Court to reconsider the premise or approach of its decision in *Red Lion*. Nevertheless, while we believe that the Court, after reexamining the issue, may well be persuaded that the transformation in the communications marketplace justifies alteration of the *Red Lion* approach to broadcast regulation,[102] we recognize that to date the Court has determined that governmental regulation of broadcast speech is subject to a standard of review under the First Amendment that is more lenient than the standard generally applicable to the print media.[103] Until the Supreme

[102] *1985 Fairness Report*, 102 FCC 2d at 155.

[103] *E.g.*, *FCC v. League of Women Voters of California*, 468 U.S. at 377. *See Red Lion Broadcasting Co. v. FCC*, *supra* n.18. Indeed, in criticizing the scarcity rationale employed by the Supreme Court in *Red Lion*, Judge Bork, in *TRAC v. FCC*, noted that until the Court revisits

Court reevaluates that determination, therefore, we shall evaluate the constitutionality of the fairness doctrine under the standard enunciated in *Red Lion* and its progeny.[104]

1. *Red Lion Broadcasting Co. v. FCC*

37. Eighteen years ago, the Supreme Court, in *Red Lion Broadcasting Co. v. FCC*, upheld the constitutionality of the fairness doctrine because it believed, at that time, that the doctrine promoted "the paramount [F]irst [A]mendment rights of viewers and listeners to receive 'suitable access to . . . ideas and experiences.' "[105] In that decision, the Court clearly articulated a First Amendment standard for evaluating broadcast regulation which provided less protection to the speech of broadcast journalists than that accorded to journalists in other media. The Court held that, "[i]n view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable

Red Lion, "neither [the Court of Appeals] nor the Commission is free to seek new rationales to remedy the inadequacy of the doctrine in this area." *TRAC v. FCC*, 801 F.2d at 509; *see also Branch v. FCC*, No. 86-1256, slip op. at 25-26 (D.C. Cir. July 21, 1987) (But unless the Court itself were to overrule *Red Lion*, we remain bound by it.).

[104] Some commenters, however, contend that the fact that the Supreme Court in *Red Lion* determined that the fairness doctrine was constitutional almost two decades ago mandates a finding by this Commission that the doctrine is constitutional today. We disagree. If this were so, the Court of Appeals would not have remanded this case for us to consider Meredith's constitutional arguments, because our initial failure to consider them would not have been reversible error. Indeed, for the reasons set forth below, we believe the rationale employed by the Court in *Red Lion* compels the conclusion that the fairness doctrine contravenes the First Amendment today, when evaluated consistent with the principles of *Red Lion*. Furthermore, the relationship between the application of constitutional principles in this area and the advances in technology are such, as the Supreme Court has indicated, that it is necessary to review past decisions to ensure their consistency with current technology. *See infra* 66-72.

[105] *American Security Council Education Foundation v. FCC*, 607 F.2d 438, 443- 44 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980), quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 389-90.

without government assistance to gain access to those frequencies for expression of their views,"[106] the government could require persons who were granted a license to operate "as a proxy or fiduciary with obligations to present those views and voices which are representative of his community."[107] The Court thus described what it subsequently characterized as "an unusual order of First Amendment values;"[108] it determined that governmental restrictions on the speech of broadcasters could be justified if they furthered the interests of listeners and viewers.

38. Although the Court in *Red Lion* articulated this standard for broadcast regulation, in several respects its holding was narrow in scope. First, the Court, in explicit terms, disclaimed an intention of "approv[ing] every aspect of the fairness doctrine."[109] Second, as the Court in *Meredith v. FCC* noted, the *Red Lion* decision "was expressly premised on the scarcity of broadcast frequencies 'in the present state of commercially available technology' as of 1969."[110] Third, and most importantly, the Court, in determining that the doctrine satisfied the requirements of the First Amendment, relied upon the Commission's express representation that there was no evidence that the doctrine "chills speech." The Court emphasized that if the fairness doctrine were found to inhibit broadcasters from covering controversial issues of public importance:

> Such a result would indeed be a serious matter for . . . the purposes of the doctrine would be stifled. At this point, however, as the Federal Communications Commission has indicated, that possibility is at best speculative . . . . The fairness doctrine in the past has had no such overall effect.[111]

The Court in *Red Lion* expressly stated that it would reconsider its holding "if experience with the administration of [the fairness doctrine] indicates that [it] ha[s] the net effect of reducing rather than enhancing the volume and quality of coverage [of controversial issues of public importance]."[112]

2. Application of the *Red Lion* Standard

39. Under the standard enunciated by the Supreme Court for assessing the constitutionality of broadcast regulation, "it is the right of the viewers and listeners and not the broadcasters which are paramount."[113] This standard permits the

---

106 *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 395. The Court stated that "because the frequencies reserved for public broadcasting were limited in number, it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few." *Id.* at 388. We discuss the significance of this rationale more fully below. *See infra* 75-80. Although the Court's decision in *Red Lion* admittedly focused on the concept of spectrum or allocational scarcity—the fact that there were more individuals who wanted to broadcast than there were broadcast frequencies to award—the Court has also been concerned about the actual number of information outlets available in the electronic press. *See League of Women Voters of California v. FCC*, 468 U.S. at 376 n.11. To the extent that the Court is concerned about numerical scarcity in this medium, we believe, as more fully discussed below, that with the explosive growth in the number of electronic media outlets in the 18 years since *Red Lion*, there is no longer a basis for this concern. *See infra* 67-71 & 74.

107 *Id.* at 389.

108 *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 101 (1983).

109 *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 396.

110 *Meredith Corp. v. FCC*, 809 F.2d at 867, quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 388. The Court in *Red Lion* considered, *inter alia*, the state of technology in 1969 in deciding to apply a special, lenient constitutional standard to broadcast regulation. *Id.* at 396-400. It specifically recognized that "[t]he rapidity with which technological advances succeed one another . . . makes it unwise [for it] to speculate on the future allocation of that space." *Id.* at 399. The technological advances in the electronic media since the *Red Lion* decision are discussed *infra* at 67-71.

111 *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 393.

112 *Id.* at 391.

113 *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 390.

government to regulate the speech of broadcasters in order to promote the interest of the public in obtaining access to diverse viewpoints.[114]

40. In subsequent cases applying the *Red Lion* standard, the Supreme Court also recognized expressly that broadcasters have substantial rights under the First Amendment.[115] Indeed, the Court specified that in furthering the public's interest in viewpoint diversity, it "must necessarily rely in large part upon the editorial initiative and judgment of the broadcasters . . . ."[116] The Court has emphasized that "broadcasters are 'entitled under the First Amendment to exercise "the widest journalistic freedom consistent with their public [duties]." ' "[117] In addition, it has held that governmental

114 The *Red Lion* Court specified that:

> It is the right of the public to receive suitable access to social, political, esthethic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

Red Lion Broadcasting Co. v. FCC, 395 U.S. at 390. *Accord FCC v. League of Women Voters of California*, 468 U.S. at 377-78.

115 *See, e.g., FCC v. League of Women Voters of California*, 468 U.S. at 378; *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 110.

116 *FCC v. League of Women Voters of California*, 468 U.S. at 378 (citation omitted).

117 *FCC v. League of Women Voters of California*, 468 U.S. at 378, quoting *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981), quoting *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 110. The Court has emphasized that broadcasters have a significant amount of editorial discretion under the First Amendment. It has stated, in the context of a broadcast case, that:

> For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper and broadcast—can and do abuse this power is beyond doubt but. . . . the presence of these risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression.

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. at 124-25.

restrictions on broadcasters' speech are permissible under the First Amendment only in situations in which those restrictions are "narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues."[118]

41. An assessment of the constitutionality of the fairness doctrine under the standard established by *Red Lion* and its progeny, therefore, "requires a critical examination of the interests of the public and broadcasters."[119] We shall thus consider the constitutionality of the fairness doctrine from the perspective both of the public and the broadcast licensees. In so doing, we shall examine the record developed in this case and in the *1985 Fairness Report*[120] to determine, in accordance with existing Supreme Court precedent, whether the enforcement of the fairness doctrine (1) chills speech and results in the net reduction of the presentation of controversial issues of public concern[121] and (2) excessively infringes

118 *FCC v. League of Women Voters of California*, 468 U.S. at 380 (citation omitted). We note that this standard appears similar to the one employed in evaluating time, place and manner restrictions on the expression of non-electronic speech. *See, e.g., Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293 (1984); *City of Renton v. Playtime Theatres*, 106 S. Ct. at 928. In general, the Court utilizes the lenient "time, place and manner" standard only in situations involving content-neutral regulations. *E.g., Clark v. Community for Creative Nonviolence*, 468 U.S. at 293. In *League of Women Voters*, the Court used this standard in evaluating a statute regulating speech on broadcast frequencies that was not content-neutral, presumably because of a lesser First Amendment right afforded broadcasters.

119 *FCC v. League of Women Voters of California*, 468 U.S. at 381.

120 We hereby incorporate the findings in the *1985 Fairness Report* into this record and, as more fully explained below, reaffirm the findings and conclusions contained in that *Report*.

121 *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 391, 393; *FCC v. League of Women Voters of California*, 468 U.S. at 378 n.12.

on the editorial discretion of broadcast journalists and involves unnecessary government intervention to the extent that it is no longer narrowly tailored to meet its objective.[122]

(a) Chilling Effect of the Doctrine

42. In the *1985 Fairness Report*, the Commission evaluated the efficacy of the fairness doctrine in achieving its regulatory objective. Based upon the compelling evidence of record, the Commission determined that the fairness doctrine, in operation, thwarts the purpose that it is designed to promote. Instead of enhancing the discussion of controversial issues of public importance, the Commission found that the fairness doctrine, in operation, "chills" speech.

43. The Commission documented that the fairness doctrine provides broadcasters with a powerful incentive not to air controversial issue programming above that minimal amount required by the first part of the doctrine.[123] Each time a broadcaster presents what may be construed as a controversial issue of public importance, it runs the risk of a complaint being filed, resulting in litigation and penalties, including loss of license. This risk still exists even if a broadcaster has met its obligations by airing contrasting viewpoints, because the process necessarily involves a vague standard, the application and meaning of which is hard to predict. Therefore, by limiting the amount of controversial issue programming to that required by the first prong (*i.e.*, its obligation to cover controversial issues of vital importance to the community), a licensee is able to lessen the substantial burdens associated with the second prong of the doctrine (*i.e.*, its obligation to present contrasting viewpoints) while conforming to the strict letter of its regulatory obligations. The licensee, consistent with its fairness doctrine obligations, may forego coverage of

122 *See FCC v. League of Women Voters of California*, 468 U.S. at 378, 380.

123 *1985 Fairness Report*, 102 FCC 2d at 161.

other issues that, although important, do not rise to the level of being vital.

44. As the Commission demonstrated, the incentives involved in limiting the amount of controversial issue programming are substantial. A broadcaster may seek to lessen the possibility that an opponent may challenge the method in which it provided "balance" in a renewal proceeding. If it provides one side of a controversial issue, it may wish to avoid either a formal Commission determination that it violated agency policy or the financial costs of providing responsive programming. More important, however, even if it intends to or believes that it has presented balanced coverage of a controversial issue, it may be inhibited by the expenses of being second-guessed by the government in defending a fairness doctrine complaint at the Commission, and if the case is litigated in court, the costs of an appeal. Further, in view of its dependence upon the goodwill of its audience, a licensee may seek to avoid the possible tarnish to its reputation that even an allegation that it violated the governmental policy of "balanced" programming could entail.[124]

45. Furthermore, the Commission determined that the doctrine inherently provides incentives that are more favorable to the expression of orthodox and well-established opinion with respect to controversial issues than to less established viewpoints.[125] The Commission pointed out that a number of broadcasters who were denied or threatened with the denial of renewal of their licenses on fairness grounds had provided controversial issue programming far in excess of the typical broadcaster. Yet these broadcasters espoused provocative opinions that many found to be abhorrent and extreme, thereby increasing the probability that these broadcasters would be subject to fairness doctrine challenges.[126] The Com-

124 *1985 Fairness Report*, 102 FCC 2d at 157-69.

125 *Id.* at 188-90.

126 *1985 Fairness Report*, 102 FCC 2d at 189.

mission consequently expressed concern that the doctrine, in operation, may have penalized or impeded the expression of unorthodox or unpopular opinion,[127] depriving the public of debates on issues of public opinion that are "uninhibited, robust, and wide-open."[128] The doctrine's encouragement to cover only major or significant viewpoints, with which much of the public will be familiar, inhibits First Amendment goals of ensuring that the public has access to innovative and less popular viewpoints.

46. As noted above, these various incentives are not merely speculative. The record compiled in the fairness inquiry revealed over 60 reported instances in which the fairness doctrine inhibited broadcasters' coverage of controversial issues. Although some have sought to disparage or discount the significance of some of the specific examples cited, we have carefully reviewed these criticisms and continue to believe that those specific instances of broadcasters' conduct were broadly illustrative of a prevalent reaction to the doctrine[129] and that the record from the inquiry overwhelmingly demonstrated that broadcasters act upon those incentives and limit the amount of controversial issue programming presented on the airwaves.

---

127 *Id.* at 188.

128 *New York Times v. Sullivan*, 376 U.S. at 270. It should be noted that compliance with the fairness doctrine may involve the presentation of multiple opposing viewpoints. The notion that there are only two sides to any controversial issue of public importance is simplistic and, in most cases, unrealistic.

129 As we noted in the *1985 Fairness Report*, 102 FCC 2d at 181, a broadcaster's admission that it is inhibited from covering controversial issues of public importance is, to some extent, an admission against interest, because both journalistic standards and (in certain cases) government regulation require such coverage. Therefore, we believe that there are many more broadcasters who have been chilled, but have not so openly admitted, than the number of those who admitted so in the *1985 Fairness Report*.

47. The Commission demonstrated in the *1985 Fairness Report* that broadcasters—from network television anchors to those in the smallest radio stations—recounted that the fear of governmental sanction resulting from the doctrine creates a climate of timidity and fear, which deters the coverage of controversial issue programming.[130] The record contained numerous instances in which the broadcasters decided that it was "safer" to avoid broadcasting specific controversial issue programming, such as series prepared for local news programs, than to incur the potentially burdensome administrative, legal, personnel, and reputational costs of either complying with the doctrine or defending their editorial decisions to governmental authorities. Indeed, in the *1985 Fairness Report*, the Commission gave specific examples of instances in which broadcasters declined to air programming on such important controversial issues such as the nuclear arms race, religious cults, municipal salaries, and other significant matters of public concern.[131] In each instance, the broadcaster identified the fairness doctrine as the cause for its decision.

48. The record in the fairness inquiry demonstrated that this self-censorship is not limited to individual programs. In order to avoid fairness doctrine burdens, the Commission found that stations have adopted company "policies" which have the direct effect of diminishing the amount of controversial material that is presented to the public on broadcast stations. For example, some stations refuse to present editorials; other stations will not accept political advertisements[132]; still others decline to air public issue (or editorial) advertising; and others have policies to decline acceptance of nation-

---

130 *Id.* at 171.

131 *Id.* at 172-74.

132 The political advertisements referred to by the Commission in the *1985 Fairness Report* are those that would not be subject to the reasonable access requirements of 47 U.S.C. § 312(a)(7) and could therefore be declined for broadcast by the licensee. *See generally id.* at 174-77, and *supra* note 91.

ally produced programming that discusses controversial subjects or to have their news staffs avoid controversial issues as a matter of routine.[133] The Commission concluded, therefore, that the doctrine "inhibits the presentation of controversial issues of public importance to the detriment of the public and in degradation of the editorial prerogatives of broadcast journalists."[134]

49. Further, we believe that enforcement actions such as the one in this proceeding provide substantial disincentives to broadcasters to cover controversial issues of importance in their community. As a direct result of the Commission second-guessing the editorial discretion of Meredith's station WTVH in its coverage of an important, controversial issue, Station WTVH became embroiled in a burdensome, regulatory quagmire. Even though it has, under today's decision, ultimately prevailed in this adjudication, the station has incurred substantial litigation expenses associated with the initial adjudication, the reconsideration proceeding, the case on appeal and the subsequent remand. Its reputation has been tarnished for nearly three years by a formal adjudication by this Commission that it was unfair in its programming and somehow did not live up to professional journalistic standards. In addition, its editorial judgment as a broadcast journalist has been subject to question by government authorities. Based upon this experience, we believe that, if we were to continue to impose the doctrine, some broadcasters would continue to seek to avoid the substantial burdens associated with the doctrine by limiting their coverage of controversial issues of public importance.

---

133 *Id.* at 169-80. For example, in the Syracuse market from which the instant case arises, another commercial television station, WSTM, had a "policy" never to accept advocacy advertising. *See* Syracuse Peace Council Complaint, Exh. 2 (filed Dec. 12, 1983) (Letter from Corinne Kinane to Thomas Slaughter at 1-2).

134 *1985 Fairness Report*, 102 FCC 2d at 147.

50. Several commenters in this adjudication challenge the Commission's determination in 1985 that the fairness doctrine in operation inhibits the expression of controversial issues of public importance. The arguments presented by these parties, however, are the same contentions which already have been carefully considered and rejected by the Commission in its *1985 Fairness Report*.[135] Therefore, for the reasons set forth in that *Report*, we do not find them persuasive, and we reaffirm the fundamental determinations contained in the *1985 Fairness Report*.

51. Fisher Broadcasting Inc. was the sole broadcaster in this proceeding to assert to us that the fairness doctrine has not inhibited its stations' coverage of controversial issues of public importance.[136] In the 1985 inquiry, Westinghouse Broadcasting & Cable Co. was the sole broadcaster to make a similar claim.[137] We do not believe, however, that statements by these or other licensees demonstrate generally an absence of a "chilling effect" in the broadcasting industry. As we stated in the *1985 Fairness Report*:

> [W]e do not believe that the isolated representations of some broadcasters to the effect that the doctrine does not have any effect on the type, frequency or duration of the controversial viewpoints they air are probative of an absence of chilling effect within the industry as a whole; the fact that some broadcasters may not be inhibited in the presentation of controversial issues of public importance does not prove that broadcasters in general are similarly uninhibited.[138]

The record in that *Report* demonstrates that many broadcasters are in fact inhibited by fairness doctrine burdens from

---

135 *Id.* at 167-68, 180-87.

136 Fisher Comments at 3.

137 *1985 Fairness Report*, 102 FCC 2d at 181-82.

138 *Id.* at 182.

covering controversial issues of public importance. No broadcaster indicated to us that its coverage of controversial issues has increased as a result of the fairness doctrine, and absent such evidence to offset the numerous instances of chill that we have identified, we can only conclude that the overall net effect of the doctrine is to reduce the coverage of controversial issues of public importance, in contravention of the standard announced in *Red Lion*.[139]

(b) The Extent and Necessity of Government Intervention into Editorial Discretion

52. As explained above, the Supreme Court has held that restrictions on the content of broadcasters' speech must be narrowly tailored to achieve a substantial government interest in order to pass constitutional muster.[140] As part of an analysis of such a requirement, we look to the *1985 Fairness Report*, in which the Commission examined the appropriate role of government in regulating the expression of opinion. Historically, the Commission has taken the position that the agency had an affirmative obligation, derived from the First Amendment, to oversee the content of programming through enforcement of the fairness doctrine in order to ensure the availability of diverse viewpoints to the public.[141] After care-

[139] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 391. Certain parties, such as Safe Energy Communication Council, set forth case studies in support of their view that the fairness doctrine promotes the discussion of controversial issues of public importance. In light of the substantial evidence contained in the *1985 Fairness Report*, however, we remain convinced that the net effect of the doctrine is to inhibit the expression of opinion on important public issues.

[140] *FCC v. League of Women Voters of California*, 468 U.S. at 380.

[141] For example, in what it characterized as "a different approach to the First Amendment," the Commission justified the fairness doctrine in its *1974 Fairness Report*, by taking the position that the agency had an affirmative obligation under the Constitution to impose restrictions on the speech of broadcasters in order to promote "balanced" controversial issue programming. 48 FCC 2d at 3. Even at the time of the *1974 Fairness Report*, however, the Commission recognized the anomaly in

ful reflection, however, the Commission, with respect to the fairness doctrine, repudiated the notion that it was proper for a governmental agency to intervene actively in the marketplace of ideas.[142] The Commission found that the enforcement of the doctrine requires the "minute and subjective scrutiny of program content,"[143] which perilously treads upon the editorial prerogatives of broadcast journalists. The Commission further found that in administering the doctrine it is forced to undertake the dangerous task of evaluating particular viewpoints.[144] The fairness doctrine thus indisputably represents an

justifying governmental scrutiny of speech allegedly to "promote" First Amendment values. *See supra* 83-94.

[142] *See 1985 Fairness Report*, 102 F.2d at 224-25. The Supreme Court has unambiguously repudiated any notion that the First Amendment affirmatively *requires* governmental intervention to ensure diversity in the marketplace of ideas. In *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 126-30, the Court reversed a lower appellate court decision which held that there was a constitutionally mandated "right of access" on the part of individual members of the public to have "some opportunity to take the initiative and editorial control into their own hands on the broadcast media." *Business Executives' Moves for Vietnam Peace v. FCC*, 450 F.2d 642, 656 (D.C. Cir. 1971), *rev'd sub nom. Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973). In deciding that members of the public had no constitutional right to place editorial advertisements, the Supreme Court emphasized that broadcasters have editorial discretion to determine the material which is to be covered. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 124-26. Further, noting the "difficult problems involved in implementing . . . a right of access," the Court recognized that a "problem of critical importance to broadcast regulation and the First Amendment [is] the risk of an enlargement of government control over the content of broadcast discussion of public issues." *Id.* at 126. *See Public Interest Research Group v. FCC*, 522 F.2d 1060, 1067 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 965 (1976) (court of appeals rejected contention that the First Amendment mandates enforcement of the fairness doctrine); *see also TRAC v. FCC*, 801 F.2d at 518.

[143] *1985 Fairness Report*, 102 FCC 2d at 191.

[144] Judge Bazelon recognized the danger in such a task when he stated: "Truth and fairness have a too uncertain quality to permit the government to define them. . . . [I]n order to determine what the 'other

intrusion into a broadcaster's editorial discretion, both in its enforcement and in the threat of enforcement. It requires the government to second-guess broadcasters' judgment on the issues they cover, as well as on the manner and balance of coverage. The penalties for noncompliance range from being required to provide free air time, under some circumstances, to providing contrasting viewpoints, in others, to loss of license, in extreme cases. Even though an individual violation might not lead to license revocation, the court in *Meredith* noted that the mere finding of a violation "has its own coercive impact."[145]

53. In this regard, the Commission noted that, under the fairness doctrine, a broadcaster is only required to air "major viewpoints and shades of opinion" to fulfill its balanced programming obligation under the second part of the doctrine.[146] In administering the fairness doctrine, therefore, the Commission is obliged to differentiate between "significant" viewpoints which warrant presentation to fulfill the balanced programming obligation and those viewpoints that are not deemed "major" and thus need not be presented. The doctrine forces the government to make subjective and vague value judgments among various opinions on controversial issues to determine whether a licensee has complied with its regulatory obligations.[147]

54. In addition, the Commission expressed concern that the fairness doctrine provides a dangerous vehicle—which had been exercised in the past by unscrupulous officials—for the intimidation of broadcasters who criticize governmental pol-

side' is, one has to have an objective concept of truth against which to compare the challenged speech. And who in this country is in possession of this objective concept of truth?" Bazelon, "FCC Regulation of the Telecommunications Press," 75 Duke L.J. 213, 236-37 (1975).

145 *Meredith Corp. v. FCC*, 809 F.2d at 873.

146 *1974 Fairness Report*, *supra* note 2, at 15.

147 *See, e.g., Coates v. Cincinnati*, 402 U.S. 611 (1970); *Cohen v. California*, 403 U.S. 15 (1970).

icy.[148] It concluded that the inherently subjective evaluation of program content by the Commission in administering the doctrine contravenes fundamental First Amendment principles.[149] We reaffirm these determinations and find that enforcement of the fairness doctrine necessarily injects the government into the editorial process of broadcast journalists.

55. In further analyzing whether the fairness doctrine is narrowly tailored to achieve a substantial government interest, we look again to our evaluation in the *1985 Fairness Report* of whether this type of government regulation is in fact necessary to ensure the availability of diverse sources of information and viewpoints to the public.[150] In that *Report*, the Commission undertook a comprehensive review of the information outlets currently available to the public. This review, as discussed in more detail below,[151] revealed an explosive growth in both the number and types of such outlets in every market since the 1969 *Red Lion* decision. And this trend has continued unabated since 1985. For example, 96% of the public now has access to five or more television stations. Currently, listeners in the top 25 markets have access to an average of 59 radio stations, while those in even the smallest markets have access to an average of six radio stations. In

148 *1985 Fairness Report*, 102 FCC 2d at 192-94.

149 In the *1985 Fairness Report*, the Commission determined that the administration of the doctrine requires the agency to make detailed determinations which are necessarily subjective. *See, e.g., id.* at 183 n.147.

150 Although the standard announced in *League of Women Voters* only requires the Commission to determine whether the doctrine is *narrowly tailored*—not *necessary*—to achieve a substantial government interest, our report in 1985 went so far as to determine that the doctrine was not necessary to achieve its purpose. Having determined that the doctrine is not necessary to serve a substantial government interest, then its intrusive means into the editorial process cannot possibly be narrowly tailored.

151 *See infra* 67-71. At this point in the discussion, we note that the increase in the number of media outlets available to the public not only discredits the claim of numerical scarcity in the electronic media, but

contrast to that, only 125 cities have two or more daily newspapers published locally. Nationwide, there are 1315 television and 10,128 radio stations, while recent evidence indicates that there are 1657 daily newspapers. The number of television stations represents a 54% increase since the *Red Lion* decision, while the number of radio stations represents a 57% increase. Not only has the number of television and radio stations increased the public's access to a multiplicity of media outlets since 1969, but the advent and increased availability of such other technologies as cable and satellite television services have dramatically enhanced that access. As a result of its 1985 review, the Commission determined that "the interest of the public in viewpoint diversity is fully served by the multiplicity of voices in the marketplace today"[152] and that the growth in both radio and television broadcasting alone provided "a reasonable assurance that a sufficient diversity of opinion on controversial issues of public importance [would] be provided in each broadcast market."[153] It concluded, therefore, and we continue to believe, that government regulation such as the fairness doctrine is not necessary to ensure that the public has access to the marketplace of ideas.

56. None of the commenters in this proceeding has challenged the underlying data contained in the *1985 Fairness Report* demonstrating the significant increase in the number and types of information services. In its Comments, however, the ACLU attempts to discount the importance of the Commission's findings. For example, disputing the significance of the substantial growth in the number of television stations, the ACLU argues that most of this increase has been in UHF independent stations which, it speculates, may not contribute to the diversity of viewpoints.[154] We disagree. The ACLU has

---

also demonstrates that the doctrine is no longer narrowly tailored to achieve its objective.

152 *1985 Fairness Report*, 102 FCC 2d at 147.

153 *Id.* at 208.

154 ACLU Comments at 8-11.

provided no meaningful basis for us to reconsider our conclusion that independent stations can contribute—and do contribute—significantly to the marketplace of ideas. Therefore, we continue to believe that the contributions of UHF stations must be considered in any meaningful assessment of the information services marketplace.[155]

57. In its Comments, the ACLU also attempts to downplay the importance of our finding that the number of signals received by individual television viewers has increased substantially. In making its argument, the ACLU does not question the existence of the substantial growth in the number of signals available to individual television households.[156] Rather, it argues that not all of the signals of these stations originate in the viewers' community of license.[157] However, as we stated in our *1985 Fairness Report*, in assessing viewpoint diversity in the context of the fairness doctrine, "the relevant inquiry is not what stations are licensed to a community, but rather what broadcast signals [an individual] can actually receive."[158] Viewers can obtain information on controversial issues of public importance from stations which they can receive whether or not the signal happens to originate in their community.[159] Similarly, citing the *1985 Fairness Report*, the

---

155 Citing newspaper and magazine articles, the ACLU contends that some of these stations are "struggling for economic survival." *Id.* at 8-9. As we stated in our *1985 Fairness Report*, however, we believe that "the growth of this service—113 percent since *Red Lion*—is evidence of its economic viability." 102 FCC 2d at 206. While every station may not be successful, we do not believe that any persuasive evidence has been proffered to justify a conclusion that electronic media choices will not continue to increase or that they will not continue to contribute to the diversity of viewpoints.

156 Indeed, it specifically cites the Commission's finding that 96 percent of all television households are capable of receiving five or more off-the-air television signals. ACLU Comments at 9.

157 *Id.* at 9.

158 *1985 Fairness Report*, 102 FCC 2d at 219 (citation omitted).

159 In addition, we reject ACLU's contention that there may be no increase in viewpoint diversity from the increase in the number of tele-

ACLU acknowledges that the number of radio stations has increased dramatically.[160] It speculates, however, that "despite the dramatic growth of radio over the past three decades, viewpoint diversity on controversial issues of public importance *may* not have changed. . . ."[161] Specifically, it argues that most of the increase is in FM stations which, in its view, carry less controversial issue programming than their AM counterparts, and that public affairs programming on radio generally has decreased.[162] We are not persuaded by these speculative contentions. To the contrary, we remain convinced that the dramatic growth in the number of both radio stations and television stations has in fact increased the amount of information, as well as the diversity of viewpoints, available to the public in both large and small broadcast markets.[163] We

vision stations because the members of the public may choose not to listen or to view the controversial opinions that are broadcast. *See* ACLU Comments at 10. The Commission cannot force the dissemination of information on unwilling listeners and viewers. Our concern is properly limited to the availability of information sources, rather than whether a particular individual may choose to receive information from them.

160 *Id.* at 12. Indeed, it recognizes that the number of radio stations has increased by "280 percent since the Commission's *1949 Fairness Report*; 48 percent since the Supreme Court's 1969 *Red Lion* decision; and 30 percent since the Commission's *1974 Fairness Report*." *Id.* at 12 (citation omitted).

161 *Id.* at 15 (emphasis added).

162 *Id.* at 10-14.

163 ACLU asserts that the "average" person listens to only a few stations. Because most radio listeners actually hear only the viewpoints which are aired on a few stations, ACLU suggests that the growth in the number of stations does not equate with an increase in viewpoint diversity. *Id.* at 14. It also states that "people primarily rely today on television for news and public affairs, and increasingly consider radio to be largely an entertainment medium." *Id.* at 15. We believe, however, that the relevant criterion is the available information rather than the actual listening patterns of the public. Furthermore, the number of radio stations providing an all-news/public affairs format, news breaks or top of the hour news spots leads us to conclude that listeners do not rely on radio only for its entertainment programming.

therefore reaffirm our determination in the *1985 Fairness Report* that the fairness doctrine is not necessary in any market to ensure that the public has access to diverse viewpoints from today's media outlets. Its intrusive means of interfering with broadcasters' editorial discretion, therefore, can no longer be characterized as narrowly tailored to meet a substantial government interest.

(c) Conclusion

58. As noted above, under the standard of review set forth in *Red Lion*, a governmental regulation such as the fairness doctrine is constitutional if it furthers the paramount interest of the public in receiving diverse and antagonistic sources of information. Under *Red Lion*, however, the constitutionality of the fairness doctrine becomes questionable if the chilling effect resulting from the doctrine thwarts its intended purpose. Applying this precedent, we conclude that the doctrine can no longer be sustained.

59. In the *1985 Fairness Report*, we evaluated whether the fairness doctrine achieved its purpose of promoting access to diverse viewpoints. After compiling a comprehensive record, we concluded that, in operation, the fairness doctrine actually thwarts the purpose which it is designed to achieve. We found that the doctrine inhibits broadcasters, on balance, from covering controversial issues of public importance. As a result, instead of promoting access to diverse opinions on controversial issues of public importance, the actual effect of the doctrine is to "overall lessen[ ] the flow of diverse viewpoints to the public."[164] Because the net effect of the fairness doctrine is to reduce rather than enhance the public's access to viewpoint diversity, it affirmatively disserves the First Amendment interests of the public. This fact alone demon-

164 *1985 Fairness Report*, 102 FCC 2d at 171.

strates that the fairness doctrine is unconstitutional under the standard of review established in *Red Lion*.[165]

60. Furthermore, almost two decades of Commission experience in enforcing the fairness doctrine since *Red Lion* convince us that the doctrine is also constitutionally infirm because it is not narrowly tailored to achieve a substantial government interest. Because the fairness doctrine imposes substantial burdens upon the editorial discretion of broadcast journalists and, because technological developments have rendered the doctrine unnecessary to ensure the public's access to viewpoint diversity, it is no longer narrowly tailored to meet a substantial government interest and therefore violates the standard set forth in *League of Women Voters*.[166] The doctrine requires the government to second-guess broadcasters' judgment on such sensitive and subjective matters as the "controversiality" and "public importance" of a particular issue, whether a particular viewpoint is "major," and the "balance" of a particular presentation. The resultant overbreadth of the government's inquiry into these matters is demonstrated by the chill in speech that we have identified. The doctrine exacts a penalty, both from broadcasters and, ultimately, from the public, for the expression of opinion in the electronic press. As a result, broadcasters are denied the editorial discretion accorded to other journalists, and the public is deprived of a more vigorous marketplace of ideas, unencumbered by governmental regulation.

---

165 The Court expressly stated that:

> were it to be shown by the Commission that the fairness doctrine has "the net effect of reducing rather than enhancing" speech, we would then be *forced* to reconsider the constitutional basis of our decision in that case.

FCC v. League of Women Voters of California, 468 U.S. at 378 n.12, quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 393 (emphasis added).

166 *FCC v. League of Women Voters of California*, 460 U.S. at 380.

61. In sum, the fairness doctrine in operation disserves both the public's right to diverse sources of information and the broadcaster's interest in free expression. Its chilling effect thwarts its intended purpose, and it results in excessive and unnecessary government intervention into the editorial processes of broadcast journalists. We hold, therefore, that under the constitutional standard established by *Red Lion* and its progeny, the fairness doctrine contravenes the First Amendment and its enforcement is no longer in the public interest.

C. PREFERRED CONSTITUTIONAL APPROACH

62. Our review of the Supreme Court precedent in the application of First Amendment principles to the electronic media leads to an inescapable conclusion: throughout the development of these principles, the Supreme Court has repeatedly emphasized that its constitutional determinations in this area of the law are closely related to the technological changes in the telecommunications marketplace. For example, in the *Red Lion* decision itself, the Court indicated that advances in technology could have an effect on its analysis of the constitutional principles applicable to the electronic media.[167] The Court of Appeals noted this in *Meredith v. FCC*, when it said that the *Red Lion* decision "was expressly premised on the scarcity of broadcast frequencies 'in the present state of commercially available technology' as of 1969."[168] And in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, the Supreme Court stated that:

> Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of

---

167 *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 397-99 (indicating that its decision was based on the technology of the day).

168 *Meredith Corp. v. FCC*, 809 F.2d at 867, quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 388.

> great delicacy and difficulty . . . . The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded ten years hence.[169]

63. The Court's most recent statement on this issue came in its decision in *FCC v. League of Women Voters of California*. Acknowledging that certain persons, including former Chairman Mark Fowler, "charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete,"[170] the Court indicated that it may be willing to reassess its traditional reliance upon spectrum scarcity upon a "signal" from the Congress or this Commission "that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."[171]

64. That principles applicable to the government's regulation of a rapidly changing industry such as telecommunications should be revisited and revised in light of technological advances is not an unusual proposition. Indeed, the Commission, in its task of managing an ever-changing technological and economic marketplace, has the responsibility to consider new developments in reviewing existing, and in applying new,

---

169 412 U.S. at 102.

170 468 U.S. at 376 n.11 (citations omitted).

171 *Id.* at 377 n.11. The United States Court of Appeals for the District of Columbia Circuit on several occasions has also indicated that the increase in the number of information outlets may affect the extent to which the speech of broadcasters is protected under the First Amendment. *Loveday v. FCC*, 707 F.2d 1443, 1459 (D.C. Cir.), *cert. denied*, 464 U.S. 1008 (1983); *Banzhaf v. FCC*, 405 F.2d 1000 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). *See TRAC v. FCC*, 801 F.2d at 508 nn.4-5.

rationales in that marketplace.[172] With respect to the fairness doctrine itself, a policy that the Commission defended before the Supreme Court in 1969, our comprehensive study of the telecommunications market in the *1985 Fairness Report* has convinced us that a rationale that supported the doctrine in years past is no longer sustainable in the vastly transformed, diverse market that exists today. Consequently, we find ourselves today compelled to reach a conclusion regarding the constitutionality of the fairness doctrine that is very different from the one we reached in 1969.

65. We believe that the *1985 Fairness Report*, as reaffirmed and further elaborated on in today's action, provides the Supreme Court with the signal referred to in *League of Women Voters*.[173] It also provides the basis on which to reconsider its application of constitutional principles that were developed for a telecommunications market that is markedly different from today's market. We further believe that the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press. Therefore, in response to the question raised by the Supreme Court in *League of Women Voters*, we believe that the standard applied in *Red Lion* should be reconsidered and that the constitutional

---

172 *E.g.*, *Television Deregulation*, *supra* note 101; *Radio Deregulation*, *supra* note 101. It is appropriate for an administrative agency to modify or eliminate its policies if the conditions addressed by the regulation have changed. *See, e.g., NAACP v. FCC*, 682 F.2d 993, 998 (D.C. Cir. 1982). *See generally, Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. at 57. As the Supreme Court has stated, "the Commission should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully." *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 603 (1981). Further, an agency should not continue to regulate if it can no longer perceive a need for governmental regulation. *NAACP v. FCC*, 682 F.2d at 1000-01.

173 In fact, the D.C. Circuit also suggested that our *1985 Fairness Report* was such a signal. *Branch v. FCC*, No. 86-1256, slip op. at 25-26 (D.C. Cir. July 21, 1987); *see also TRAC v. FCC*, 801 F.2d at 509 n.5.

principles applicable to the printed press should be equally applicable to the electronic press.

1. Basis for Reconsidering *Red Lion*

66. In the *1985 Fairness Report*, the Commission examined, in a comprehensive manner, the number and types of outlets currently providing information to the public, including the traditional broadcast services, the new electronic sources, and the print media.[174] The Commission found in recent years that there had been an explosive growth in both the number and types of outlets providing information to the public. Hence, the Supreme Court's apparent concern that listeners and viewers have access to diverse sources of information has now been allayed.

67. With respect to the number of radio stations, the Commission demonstrated that in 1985 there were 9,766 radio stations nationwide, a 48 percent increase in radio stations overall since the date of the Supreme Court's decision in *Red Lion* and a 30 percent increase in the number of radio stations since the *1974 Fairness Report*. As stated above, that number now stands at 10,128 a 54% increase since the 1969 *Red Lion* decision. The Commission also concluded in the *1985 Fairness Report* that the growth in FM stations, in particular, had been dramatic. Specifically, the Commission found that this service had increased by 113 percent since the *Red Lion* decision and by 60 percent since the *1974 Fairness Report*.[175] Further, the Commission found "of particular significance" the fact that the number of radio voices in each local market had

---

174 Because "the various media are in fact information substitutes in the marketplace of ideas" (*1985 Fairness Report*, 102 FCC 2d at 199), the Commission determined that it was appropriate to consider the different outlets in the information services marketplace in assessing the continued need for the fairness doctrine. *Id.* at 198-202.

175 *1985 Fairness Report*, 102 FCC 2d at 202-04. Today, there are 5,241 FM stations, more than a 100% increase since *Red Lion*.

grown.[176] With continuing technological advances in spectrum efficiency, the Commission predicted that the number of radio outlets would continue to increase.[177]

68. With respect to television stations, the Commission documented that in 1985 the number of television stations overall was 1,208, an increase of 44.3 percent since the *Red Lion* decision and 28 percent since *1974 Fairness Report*. And that number has increased to 1315 today, a 57% increase since the 1969 *Red Lion* decision. The Commission also found in the *1985 Fairness Report* the growth in UHF stations in particular to have been even more dramatic than the overall growth in television stations: the number of UHF stations increased by 113 percent since the *Red Lion* decison and 66.4 percent since the *1974 Fairness Report*. The Commission found further that the growth in television broadcasting has directly resulted in a significant increase in the number of signals available to individual viewers in both the larger and smaller markets. Specifically, without the enhancing capability of cable television, the Commission determined that 96 percent of the television households receive five or more television signals. In 1964, only 59 percent of these households were able to receive five or more stations. With the growth of UHF television, the increase in the importance of independent television and the development of new program distribution systems among group owners, the Commission also found that the structure of the medium had become more competitive.[178]

69. Although the Commission found that the number of radio and television outlets alone ensured that the public had access to diverse sources of information in each broadcast

---

176 *Id.* at 203.

177 *Id.* We note that the numbers of radio stations cited by way of example herein do not include the number of outstanding allocations for which licenses have not yet been issued. Including recent FM radio allocations, 1266 allotments are available for licensing in due course by the Commission.

178 *Id.* at 204-07.

market (large and small),[179] it also found that cable television, which had increased exponentially during the period from 1969 to 1985, had enhanced significantly the amount of information available to the public.[180] Since the *1974 Fairness Report*, the Commission demonstrated that the number of persons subscribing to cable television had increased by 345 percent and the number of cable systems had increased by 111 percent. Based upon its assessment of the marketplace, the Commission predicted that cable television would continue to expand in the future. It determined further that there had been a significant change in the nature of cable service, as the number of channels available to individual subscribers had increased dramatically. For example, in 1969 only 1 percent of all cable systems had the capability of carrying more than 12 channels; by 1987 69 percent of all cable systems (and 92% of cable subscribers) had this capacity. Thus, in addition to the substantial increases in the absolute number of cable systems and in the percentage of cable subscribers, the Commission concluded that the amount of information available to an individual viewer on a single cable system had increased.[181] The statistical data contained in ACLU's comments actually support a reaffirmation of this determination. Characterizing cable as "the most dynamic video medium today,"[182] the ACLU states that "[a]pproximately 71 million television households—74.7 percent of all television households—have access to cable television service."[183] It also notes that 47 percent of all television households are actual

---

179 *Id.* at 208.

180 It is also significant that the presence of cable in the smaller markets may often enhance the number of accessible broadcast outlets in those markets. *See id.* at 210.

181 *Id.* at 209-10; *Television Factbook*, Services Volume, at A-41 (1987).

182 ACLU Comments at 18.

183 *Id.* (citation omitted).

subscribers of that service.[184] It asserts further that both the availability and number of subscribers to cable television will continue to increase. Specifically, in three years it predicts that almost 90 percent of television households will have access to cable and that 54 percent will subscribe to it.[185]

70. In addition, the Commission evaluated the contributions of a number of new electronic technologies unavailable at the time of the *Red Lion* decision, including low power television, MMDS, video cassette recorders (VCRs), and satellite master antenna systems (SMATV). It found that each of these new services also were contributing significantly to the diversity of information available to the public.[186] Noting the development of a number of additional information technologies, the Commission determined that there were a number of other electronic services, such as direct home to satellite services, satellite news gathering, subscription television, FM radio subcarriers, teletext, videotext and home computers "have the potential of becoming substitute information sources in the marketplace of ideas."[187] Some of these technologies, such as teletext and videotext, are beginning to merge characteristics of the electronic media with those of the print media, further complicating the choice of an appropriate constitutional standard to be applied to their regulation.[188]

---

184 More than 43,000,000 households now subscribe to cable services according to *Nielson Media Research* (1987).

185 ACLU Comments at 18-19.

186 *1985 Fairness Report*, 102 FCC 2d at 208-17. In its *1985 Fairness Report*, the Commission also considered the role of the print media in the information services marketplace. It concluded that newspapers and magazines, as well as the electronic media, contribute significantly to the marketplace of ideas. *Id.* at 217-18.

187 *Id.* at 214; *see id.* at 208-17.

188 Additionally, newspaper reporters are increasingly relying on the use of the spectrum to send their messages to their editors and ultimately to the printing presses.

71. As noted above, none of the commenters in this proceeding has challenged the underlying data contained in the *1985 Fairness Report* with respect to the dramatic increase in the number and types of alternative technologies available to the public. For instance, ACLU's own data demonstrate the soundness of our determination that the number of broadcast outlets has exploded and that cable television has evolved into a significant information source. In its Comments, the ACLU also asserts that in the short period of time since the *1985 Fairness Report*, the number of low power television stations has increased by 12 percent from 341 stations to 383 stations.[189]

72. We believe that the dramatic changes in the electronic media, together with the unacceptable chilling effect resulting from the implementation of such regulations as the fairness doctrine,[190] form a compelling and convincing basis on which to reconsider First Amendment principles that were developed for another market. Today's telecommunications market offers individuals a plethora of information outlets to which they have access on a daily basis. Indeed, this market is strikingly different from even that offered by the daily print media. While there are 11,443 broadcast stations nationwide, recent evidence indicates that there are only 1657 daily newspapers overall.[191] On a local level, 96% of the public has access to five or more television stations, while only 125 cities have two or more local newspapers. The one-newspaper town is becoming an increasing phenomenon. Our review of the Supreme Court's statements on the relationship between constitutional principles and technological developments leads us to conclude that it would now be appropriate for the Supreme Court to reassess its *Red Lion* decision.

189 ACLU Comments at 17.

190 *See supra* 42-51.

191 Of the media universe that is composed of newspapers, AM and FM radio stations, and television stations, 87% is made up of broadcast facilities.

2. The Scarcity Rationale

73. Certain parties, taking the position that the basis underlying the scarcity rationale in *Red Lion* is either illogical or anachronistic, assert that the appropriate constitutional test to assess content-based regulations of the electronic media is the one enunciated for the print media.[192] These commenters point to the explosive growth in the number and types of information sources in support of their assertion that the scarcity doctrine is no longer viable. Other commenters, in contrast, state that the general standards of First Amendment jurisprudence applied by the Court in cases not involving broadcast regulation are irrelevant in determining whether the fairness doctrine and other content-based regulations are constitutional. They assert that the increase in the number and types of information sources has nothing to do with the existence of scarcity in the constitutional sense, and emphasize that the appropriate standard of review is that applied by the Court in *Red Lion* and its progeny specifically relating to broadcast regulation.[193] These parties describe two different notions of scarcity—numerical scarcity and spectrum (or allocational) scarcity. We do not believe that any scarcity rationale justifies differential First Amendment treatment of the print and broadcast media.

74. As stated above, we no longer believe that there is scarcity in the number of broadcast outlets available to the public. Regardless of this conclusion, however, we fail to see how the constitutional rights of broadcasters—and indeed the rights of the public to receive information unencumbered by government intrusion—can depend on the number of infor-

192 *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1971); *see also infra* 95-96.

193 These commenters maintain that scarcity, as it has been defined by the Supreme Court, is a state where "there are substantially more individuals who want to broadcast than there are frequencies to allocate." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 388.

mation outlets in particular markets. Surely, a requirement of multiple media outlets could not have formed the basis for the framers of the First Amendment to proscribe government interference with the editorial process. At the time the First Amendment was adopted, there were only eight daily newspapers, seventy weekly newspapers, ten semi-weekly newspapers and three tri-weekly newspapers published in America.[194]

75. Because there is no longer a scarcity in the number of broadcast outlets, proponents of a scarcity rationale for the justification of diminished First Amendment rights applicable to the broadcast medium must rely on the concept of spectrum (or allocational) scarcity. This concept is based upon the physical limitations of the electromagnetic spectrum. Because only a limited number of persons can utilize broadcast frequencies at any particular point in time, spectrum scarcity is said to be present when the number of persons desiring to disseminate information on broadcast frequencies exceeds the number of available frequencies. Consequently, these frequencies, like all scarce resources, must be allocated among those who wish to use them.

76. In fact, spectrum scarcity was one of the bases articulated by the Court in *Red Lion* for the disparate treatment of the broadcast and the print media. Reliance on spectrum scarcity, however, "has come under increasing criticism in recent years."[195] For example, the Court of Appeals has recently questioned the rationality of spectrum scarcity as the basis for differentiating between the print and broadcast media. In *TRAC v. FCC*, the Court asserted that:

---

194 *Inquiry Into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees* in Gen. Docket No. 84-252, 49 Fed. Reg. 20,317 (May 14, 1984) at 51.

195 *FCC v. League of Women Voters of California*, 468 U.S. at 376 n.11.

> [T]he line drawn between the print media and the broadcast media, resting as it does on the physical scarcity of the latter, is a distinction without a difference. Employing the scarcity concept as an analytic[al] tool . . . inevitably leads to strained reasoning and artificial results.
>
> It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. . . . Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion.[196]

We agree with the court's analysis of the spectrum scarcity rationale, and we believe that it would be desirable for the Supreme Court to reconsider its use of a constitutional standard based upon spectrum scarcity in evaluating the intrusive type of content-based regulation at issue in this proceeding.

77. At the outset, we note that the limits on the number of persons who can use frequencies at any given time is not absolute, but is, in part, economic: greater expenditures on equipment and/or advances in technology could make it possible to utilize the spectrum more efficiently in order to permit a greater number of licensees. So the number of outlets in a market is potentially expandable, like the quantities of most other resources.

---

196 801 F.2d at 508 (footnotes omitted). Asserting that the "scarcity" rationale is not a rational basis for distinguishing between the *Red Lion* and *Tornillo* decisions, the Court of Appeals in effect urged the Supreme Court to "revisit this area of the law." *Id.* at 509.

78. Nevertheless, we recognize that technological advancements and the transformation of the telecommunications market described above have not eliminated spectrum scarcity. All goods, however, are ultimately scarce, and there must be a system through which to allocate their use. Although a free enterprise system relies heavily on a system of property rights and voluntary exchange to allocate most of these goods, other methods of allocation, including first-come-first-served, administrative hearings, lotteries, and auctions, are or have been relied on for certain other goods. Whatever the method of allocation, there is not any logical connection between the method of allocation for a particular good and the level of constitutional protection afforded to the uses of that good.

79. In the allocation of broadcast frequencies, the government has relied, for the most part, on a licensing scheme based on administrative hearings to promote the most effective use of this resource.[197] Congress has also authorized the allocation of frequencies through the use of lotteries.[198] Moreover, although the government allocates broadcast frequencies to particular broadcast speakers in the initial licensing stage, approximately 71% of today's radio stations and 54% of today's television stations have been acquired by the current licensees on the open market.[199] Hence, in the vast majority of

197 A number of the provisions of the Communications Act and our implementing regulations relate to the licensing of broadcast frequencies and related functions. *See, e.g.*, 47 U.S.C. §§ 301-10 (1982). The system of licensing in the public interest established by the Communications Act of 1934, as amended, is designed to determine the persons who may utilize broadcast frequencies.

198 47 U.S.C. § 309(i) authorizes the Commission to award licenses for the use of the electromagnetic spectrum by random selection. The Commission has used lotteries to award licenses in such services as LPTV and cellular radio.

199 The Commission passes on the basic qualifications of transferees once they have been identified by the existing licensee. *See generally* 47 U.S.C. § 309. Of course, even upon transfer, the license carries with it the obligations imposed by the Commission pursuant to the Communications Act.

cases, broadcast frequencies are "allocated"—as are the resources necessary to disseminate printed speech—through a functioning economic market. Therefore, after initial licensing, the only relevant barrier to acquiring a broadcast station is not governmental, but—like the acquisition of a newspaper—is economic.

80. Additionally, there is nothing inherent in the utilization of the licensing method of allocation that justifies the government acting in a manner that would be proscribed under a traditional First Amendment analysis. In contexts other than broadcasting, for example, the courts have indicated that, where licensing is permissible, the First Amendment proscribes the government from regulating the content of fully protected speech.[200] There are those who argue that the acceptance by broadcasters of government's ability to regulate the content of their speech is simply a fair exchange for their ability to use the airwaves free of charge. To the extent, however, that such an exchange allows the government to engage in activity that would be proscribed by a traditional First Amendment analysis, we reject that argument. It is well-established that government may not condition the receipt of a public benefit on the relinquishment of a constitutional right.[201] The evil of government intervention into the editorial

200 *E.g.*, *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Clark v. Community for Creative Non-Violence*, 468 U.S. at 293-95.

201 *E.g.*, *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (Although no one has a constitutional right to receive a government benefit, government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."); *Shapiro v. Thompson*, 394 U.S. 618 (1968). In this regard, we note that Congress has conferred upon newspapers the benefit of certain exemptions from the antitrust laws without also claiming the ability to regulate the content of the matters reported in those newspapers. *See* 15 U.S.C. §§ 1801-04.

(footnote continued)

process of the press (whether print or electronic) and the right of individuals to receive political viewpoints unfettered by government interference are not changed because the electromagnetic spectrum (or any other resource necessary to convey expression) is scarce or because the government (in conjunction with the marketplace) allocates that scarce resource.[202] Indeed, the fact that government is involved in

---

Moreover, the fact that government may license broadcasters to use frequencies in order to minimize interference, and thus to maximize the effective dissemination of speech through the electromagnetic spectrum, does not justify content regulation. As Judge Bork noted:

> A publisher can deliver his newspapers only because government provides streets and regulates traffic on the streets by allocating rights of way. Yet no one would contend that the necessity for these governmental functions, which are certainly analogous to the government's function in allocating broadcast frequencies, would justify regulation of the content of a newspaper to ensure that it serves the needs of the citizens.

TRAC v. FCC, 801 F.2d at 509. We see no reason why the grant of a broadcast license by the government should also give rise to its ability to control the content of broadcasters' speech. In other words, allocational scarcity does not justify government regulation in violation of constitutional rights.

202 We note that during World War II, for example, the government rationed the supply of newsprint and other scarce resources, but that allocation did not give rise to the government's content-based regulation of the print media. *See generally Supplies for a Free Press: Hearings Before the Subcomm. on Newsprint of the Senate Select Comm. on Small Business*, 82d Cong., 1st Sess. (1951). Indeed, the scarcity of newsprint extended throughout the war and well into the post-war period. During this time, many papers, especially dailies, were forced by circumstances to adopt such practices as circulation freezing, size reduction, and switching to weekly publication. Indications are that the shortage of newsprint due to government rationing caused many smaller newspapers to go out of business, in addition to creating a substantial barrier to those who desired entry into newspaper publishing. Yet the policy of newsprint allocation under government auspices, which caused a reduction in the overall amount of newspaper speech—due either to those who left or those who could not enter—did not give rise to the imposition of obligations on the remaining newspapers to make their facilities available for those speakers who were silenced. *See id.*

(footnote continued)

licensing is all the more reason why the First Amendment protects against government control of content.[203]

81. On the other hand, the fact that government may not impose unconstitutional conditions on the receipt of a public benefit does not preclude the Commission's ability, and obligation, to license broadcasters in the public interest, convenience and necessity. The Commission may still impose certain conditions on licensees in furtherance of this public interest obligation. Nothing in this decision, therefore, is intended to call into question the validity of the public interest standard under the Communications Act.

82. Rather, we simply believe that, in analyzing the appropriate First Amendment standard to be applied to the electronic press, the concept of scarcity—be it spectrum or

---

The Founding Fathers themselves were apparently well aware of the problems associated with scarcity in the print media. The great "paper famine," for example, occurred during the Revolutionary War when the colonies were cut off from their principal suppliers. *Id.* The existence of this scarcity, however, did not appear to affect the founders' decision to accord the press the full measure of editorial control guaranteed by the First Amendment.

203 The ability of government to control the content of individuals' speech is particularly disturbing when the government must also license those who wish to speak, because the potential for chilling speech beyond the proper scope of government concern—intentionally or unintentionally—is greater. This is a concern that carries into licensing schemes in other contexts, *see supra* note 200, and stems from the belief that "government must remain neutral in the marketplace of ideas." *FCC v. Pacifica Foundation*, 438 U.S. at 745. Broadcast licensees must deal routinely with the government on matters wholly unrelated to the content of their broadcasts. They necessarily will want to avoid any conflict with the government in handling these routine matters and, therefore, are especially susceptible to the roving eye of the government, which many times may act in an informal and unofficial manner. The relationship can be precarious even if the government has no express authority to regulate the content of speech. The grant of that express authority, however, can upset the already delicate balance that exists between the government and a free press. *See Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397, 407-10 (D.C. Cir. 1975) (Bazelon, J., dissenting from denial of rehearing).

numerical—is irrelevant.[204] As Judge Bork stated in *TRAC v. FCC*, "Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion."[205] Consequently, we believe that an evaluation of First Amendment standards should not focus on the *physical differences* between the electronic press and the printed press, but on the *functional similarities* between these two media and upon the underlying values and goals of the First Amendment. We believe that the function of the electronic press in a free society is identical to that of the printed press and that, therefore, the constitutional analysis of government control of content should be no different.[206] With this

[204] That spectrum scarcity should be irrelevant for First Amendment purposes does not affect its relevance to the Commission's allocational and licensing function. The Commission, of necessity, considers spectrum scarcity in making its allocational and licensing decisions. *See supra* note 197.

[205] *TRAC v. FCC*, 801 F.2d at 508.

[206] There are those who argue that the content of broadcasters' speech may be regulated by the government because of the impact that broadcasters can have on listeners and viewers. These proponents contend that broadcasting is a far more powerful means of communication than the printed press, and, therefore, the public should be protected from those who use the broadcast medium. We will assume for the sake of argument that broadcasters have greater "impact" than their counterparts in the print media, but we nevertheless reject the impact argument. We do not believe that the expression of speech may be regulated by government, consistent with the First Amendment, on the basis of the effectiveness of that expression. *Cf. First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1975). In fact, the rationale of the First Amendment counsels the exact opposite conclusion: the greater the effectiveness of certain speech, the more reason, given the First Amendment's presumption against government control of the press, why government should be prohibited from interfering with the ideas conveyed by such speech.

This conclusion was supported by Justice William O. Douglas, who aptly stated in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 152 n.3:

> The implication that the people of the country—except the proponents of the theory—are mere unthinking automatons manip-

in mind, we return to the *Red Lion* decision and consider its divergence from traditional First Amendment precepts protecting the role of the press in a democratic society.

3. Divergence of *Red Lion* from Traditional First Amendment Precepts

83. We believe that the articulation of lesser First Amendment rights for broadcasters on the basis of the existence of scarcity, the licensing of broadcasters, and the paramount rights of listeners[207] departs from traditional First Amendment jurisprudence in a number of respects.[208] Specifically, the

> ulated by the media, without interests, conflicts, or prejudices is an assumption which I find quite maddening. The development of constitutional doctrine should not be based on such hysterical overestimation of media power and underestimation of the good sense of the American public.

See also 1985 Fairness Doctrine, 102 FCC 2d at 221-25.

[207] Justice Douglas, who did not participate in the *Red Lion* decision, later stated that he would not have supported the Court's conclusion that the fairness doctrine did not violate the First Amendment. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 154. He explained:

> the prospect of putting government in a position of control over publishers is to me an appalling one, even to the extent of the Fairness Doctrine. The struggle for liberty has been a struggle against Government. The essential scheme of our Constitution and Bill of Rights was to take government off the backs of people. . . . [I]t is anathema to the First Amendment to allow Government any role of censorship over newspapers, magazines, books, art, music, TV, radio, or any other aspect of the press. There is unhappiness in some circles at the impotence of government. But if there is to be a change, let it come by constitutional amendment. The Commission has an important role to play in curbing monopolistic practice, in keeping channels free from interference, in opening up new channels as technology develops. But it has no power of censorship.

Id. at 162.

[208] The Court may have implicitly recognized this departure when, five years later in *Tornillo*, it struck down a statute applicable to newspapers that was similar to the fairness doctrine without ever mentioning

Court's decision that the listeners' rights justifies government intrusion appears to conflict with several fundamental principles underlying the constitutional guarantee of free speech.

84. First, this line of decisions diverges from Supreme Court pronouncements that "the First Amendment 'was fashioned to assure *unfettered* interchange of ideas for the bringing about of political and social changes desired by the people.' "[209] The framers of that Amendment determined that the best means by which to protect the free exchange of ideas is to prohibit any governmental regulation which "abridg[es] the freedom of speech or of the press."[210] They believed that the marketplace of ideas is too delicate and too fragile to be entrusted to governmental authorities.

85. In this regard, Justice Potter Stewart once stated that "[t]hose who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that 'fairness' was far too fragile to be left for a government bureaucracy to accomplish."[211] In the same vein, Justice Byron White has stated that:

> Of course, the press is not always accurate, or even responsible, and may not present full and fair debate on

or citing *Red Lion*. The Court of Appeals has stated that "[d]espite [the] holding [in *Red Lion*], important constitutional questions continue to haunt this area of the law. The doctrine and the rule do, after all involve the government to a significant degree in policing the content of communication. There are abiding First Amendment difficulties." *Straus Communications Inc. v. FCC*, 530 F.2d 1001, 1008 (D.C. Cir. 1976). *See TRAC v. FCC*, 801 F.2d at 506-09.

209 *Connick v. Myers*, 461 U.S. 138, 145 (1983), quoting *Roth v. United States*, 354 U.S. 476, 484 (1957) (emphasis added); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

210 U.S. CONST. amend. I.

211 *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 145-46 (Stewart, J., concurring).

> important public issues. But the balance struck by the First Amendment with respect to the press is that society must take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be expressed. . . . Any other accommodation—any other system that would supplant private control of the press with the heavy hand of government intrusion—would make the government the censor of what the people may read and know.[212]

Indeed, the Supreme Court has often emphasized that:

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint *or fear of subsequent punishment*.[213]

Consequently, a cardinal tenet of the First Amendment is that governmental intervention in the marketplace of ideas of the sort involved in the enforcement of the fairness doctrine is not acceptable and should not be tolerated.

86. The fairness doctrine is at odds with this fundamental constitutional precept. While the objective underlying the fairness doctrine is that of the First Amendment itself—the promotion of debate on important controversial issues—the means employed to achieve this objective, government coercion, is the very one which the First Amendment is designed to prevent.[214] As the Supreme Court has noted, "By

212 *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 260 (1974) (White, J., concurring) (*Tornillo*).

213 *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940) (footnote omitted) (emphasis added), quoted in *FCC v. League of Women Voters of California*, 468 U.S. at 381-82. *Accord First National Bank of Boston v. Bellotti*, 435 U.S. 765, 766 (1978); *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530, 534-35 (1980).

214 It is well established that the mere invocation of a laudatory regulatory objective, by itself, does not demonstrate the constitutionality

protecting those who wish to enter the marketplace of ideas from governmental attack, the First Amendment protects the public's interest in receiving information."[215] Yet the fairness doctrine *uses* government intervention in order to foster diversity of viewpoints, while the scheme established by the framers of our Constitution *forbids* government intervention for fear that it will stifle robust debate. In this sense, the underlying rationale of the fairness doctrine turns the First Amendment on its head.

87. Indeed, even when approving the doctrine in the *1974 Fairness Report*, the Commission recognized the anomaly of a policy which purports to further First Amendment values by the very mechanism proscribed by that constitutional provision. In that *Report*, the Commission explained that:

> th[e] [doctrine's] affirmative use of government power to expand broadcast debate would seem to raise a striking paradox, for freedom of speech has traditionally implied an absence of governmental supervision or control. Throughout most of our history, the principal function of the First Amendment has been to protect the free marketplace of ideas by precluding governmental intrusion.[216]

88. The *Red Lion* decision also is at odds with the well-established precept that First Amendment protections are especially elevated for speech relating to matters of public concern, such as political speech and other matters of public

---

of a governmental regulation. *See, e.g., Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1454 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 2889 (1986). Indeed, the Supreme Court, in both *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 106 S. Ct. 903 (1986), and *Tornillo*, declared unconstitutional state action, in the context of printed material, which was designed to further the same governmental purpose underlying the fairness doctrine. *See infra* 95.

215 *Pacific Gas & Electric Co. v. Public Utility Commission of California*, 106 S.Ct. at 907.

216 *1974 Fairness Report*, 48 FCC 2d at 3.

importance. Indeed, the Supreme Court, in the context of broadcast regulation, recently stated that the expression of opinion on matters of public concern is "entitled to the most exacting degree of First Amendment protection."[217] The Court has recognized that this type of speech is "indispensible to decisionmaking in a democracy."[218] As the Court has stated, "speech concerning public affairs is more than self-expression; it is the essence of self-government."[219] Because

---

217 *FCC v. League of Women Voters of California*, 468 U.S. at 375-76 (citation omitted). *See, e.g., Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558, 1565 (1986); *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2945-46 (1985), quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), quoting *Thornhill v. Alabama*, 310 U.S. at 101 (It is speech on " 'matters of public concern' " that is "at the heart of the First Amendment protection."); *Connick v. Myers*, 461 U.S. at 145, quoting *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 913 (1982) ([T]he Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values'. . . .).

218 *First National Bank of Boston v. Bellotti*, 435 U.S. at 777. The Court explained that:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsibe to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."

New York Times Co. v. Sullivan, 376 U.S. at 269, quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931).

219 *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). As a plurality of the Supreme Court recently stated, "[t]he constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression. By protecting those who wish to enter the marketplace of ideas from governmental attack, the First Amendment protects the public's interest in receiving information." *Pacific Gas & Electric Co. v. Public Utility Commission of California*, 106 S. Ct. at 907, quoting *First National Bank of Boston v. Bellotti*, 435 U.S. at 776. "The individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion, although the two often converge." *First National Bank of Boston v. Bellotti*, 435 U.S. at 777 n.12.

it is the people in a democratic system who "are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments,"[220] the "[g]overnment is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves."[221]

89. The type of speech regulated by the fairness doctrine involves opinions on controversial issues of public importance. This type of expression is "precisely that . . . which the Framers of the Bill of Rights were most anxious to protect—speech that is 'indispensible to the discovery and spread of political truth'. . . ."[222] Yet, instead of safeguarding this type of speech from regulatory intervention, the doctrine anomalously singles it out for governmental scrutiny.

90. Further, the *Red Lion* decision cannot be reconciled with well-established constitutional precedent that governmental regulations directly affecting the content of speech are subjected to particularly strict scrutiny.[223] The Supreme Court has emphasized that "[i]f the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating. . . .' "[224] As noted above, enforcement of the fairness doc-

220 *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 791 (1977).

221 *Id.* at 792 n.31 (citations omitted). *Consolidated Edison Co. of New York, Inc. v. Public Utility Commission of New York*, 447 U.S. 530 (1980).

222 *FCC v. League of Women Voters of California*, 468 U.S. at 383, quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

223 *See, e.g., FCC v. League of Women Voters of California*, 468 U.S. at 383-84; *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984); *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). *Compare, e.g., Tornillo, supra* note 192, *with United States v. O'Brien*, 391 U.S. 367 (1968).

224 *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. at 537-38, quoting Police Department of Chicago v. Mosley, 408 U.S. at 96 (ellipsis in original).

trine not only forces the government to decide whether an issue is of "public importance," but also whether the broadcaster has presented "significant" contrasting viewpoints. Unorthodox minority viewpoints do not receive favored treatment as do their "significant" counterparts. As the Court recently asserted, "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."[225]

91. The difference in the *Red Lion* approach becomes apparent when considering the validity of the fairness doctrine. The fairness doctrine indisputably regulates the content of speech. Like the statute invalidated in *FCC v. League of Women Voters of California*, "enforcement authorities must necessarily examine the content of the message that is conveyed to determine whether the views expressed concern 'controversial issues of public importance.' "[226] Yet even in the *League* case, the Court applied a standard that the regulation be narrowly tailored to achieve a substantial government interest, a standard traditionally reserved for content-neutral regulations.[227] In contrast, a traditional First

225 *Regan v. Time, Inc.*, 468 U.S. 641, 649 (1984). *See also Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1982), quoting *New York Times v. Sullivan*, 376 U.S. at 270 (Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'). *Accord Carey v. Brown*, 447 U.S. 462, 463 (1980). The Court of Appeals, in the context of broadcast regulation, has asserted that "[t]he First Amendment is unmistakeably hostile to governmental controls over the content of the press." *Banzhaf v. FCC*, 405 F.2d 1082, 1100 (D.C. Cir. 1968) (footnote omitted), *cert. denied*, 396 U.S. 842 (1969).

226 *FCC v. League of Women Voters of California*, 468 U.S. at 383 (quotation omitted).

227 *See, e.g., Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984). In *Renton v. Playtime Theatres, Inc.*, 106 S. Ct. 925 (1986), the Supreme Court determined that an ordinance which imposed more stringent zoning restrictions upon adult theaters than upon other kinds of theaters was not a content-based regulation. The purpose of the ordinance was to avoid urban blight and preserve the quality of urban

Amendment analysis would require a content-based regulation, such as the fairness doctrine, to be a "precisely drawn means of serving a compelling state interest."[228] Even under a traditional approach, therefore, content-based regulations

life, and thus the Court found the ordinance to be "justified without reference to the content of speech." *Id.* at 929 (emphasis and quotation omitted). In *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 106 S. Ct. 903 (1986)—a case decided on the same day as *Renton*—the Court invalidated a regulation that required a utility which disseminated political editorials to publish the views of its opponent as well. The plurality determined that the regulation at issue in that case was content-based because it "discriminates on the basis of the viewpoints of the selected speakers." *Id.*. at 910. It explained that the governmental purpose "in exposing [ratepayers] to a variety of viewpoints is not . . . content-neutral." *Id.* at 914. Thus, the Supreme Court has distinguished between content-neutral governmental actions, like the ordinance in Renton, whose justification was found to be unrelated to the content of speech and content-based regulations, like the one invalidated in *Pacific Gas & Electric*.

The fairness doctrine is clearly content-based. Fairness doctrine obligations do not attach to every discussion or even to those involving a controversial issue of public importance. The doctrine is implicated only where the speaker expresses an opinion on a controversial issue of public importance. Furthermore, as stated earlier, the fairness doctrine differentiates between "major" or "significant" opposing viewpoints, which qualify for coverage under the second part of the doctrine, and those opinions that are not sufficiently significant to trigger responsive programming obligations. As a consequence, in administering the doctrine, the Commission "inexorably favors orthodox viewpoints" over those which may be unpopular or unestablished. *1985 Fairness Report*, 102 FCC 2d at 188. The fairness doctrine is very different from governmental actions such as the mandatory carriage rules for cable television operators *Carriage of Television Broadcast Signals by Cable Television Systems*, 1 FCC Rcd 864 (1986), *recon. denied*, FCC 87-105 (May 1, 1987), *petition for review docketed sub nom. Turner Broadcasting System, Inc. v. FCC*, No. 86-1682 (D.C. Cir. filed December 12, 1986), the justification for which is unrelated to the content of speech and which do not distinguish among classes of speakers on the basis of the subject matter of their expression. Simply stated, where viewpoint is the trigger of government-imposed obligations, those obligations cannot be considered content-neutral.

228 *Consolidated Edison v. Public Service Comm'n*, 447 U.S. 530, 540 (1980).

are not necessarily invalid, but they are subject to a much higher standard of review than the one applicable to the broadcast media.

92. Because the dissemination of a particular viewpoint by a broadcaster can trigger the burdens associated with broadcasting responsive programming, the doctrine directly penalizes—through the prospect or reality of government intrusion—the speaker for expressing his or her opinion on a matter of public concern.[229] For even if the broadcaster has, in fact, presented contrasting viewpoints, the government, at the request of a complainant, may nevertheless question the broadcaster's presentation, which in and of itself is a penalty for simply covering an issue of public importance.

93. In this regard, we note that sound journalistic practice already encourages broadcasters to cover contrasting viewpoints on a topic of controversy. The problem is not with the goal of the fairness doctrine, it is with the use of government intrusion as the means to achieve that goal. With the existence

229 In certain cases, the doctrine may compel a speaker actively to publish opinions that are directly contrary to his or her own, and on which he or she would prefer to remain silent. The Supreme Court has emphasized that coercing a person to disseminate particular opinions is contrary to fundamental First Amendment guarantees. The Court explained that:

> [T]he right of freedom of thought protected by the First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all. A system which secures the right to proselytize religious, political and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."

Wooley v. Maynard, 430 U.S. 705, 714 (1977), *quoting West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943). The fairness doctrine is thus a government-imposed obligation that "both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set." *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 106 S. Ct. at 908.

of a fairness doctrine, broadcasters who intend to, and who do in fact, present contrasting viewpoints on controversial issues of public importance are nevertheless exposed to potential entanglement with the government over the exercise of their editorial discretion. Consequently, these broadcasters may shy away from extensive coverage of these issues. We believe that, in the absence of the doctrine, broadcasters will more readily cover controversial issues, which, when combined with sound journalistic practices, will result in more coverage and more diversity of viewpoint in the electronic media; that is, the goals of the First Amendment will be enhanced by employing the very means of the First Amendment: government restraint.

94. Finally, we believe that under the First Amendment, the right of viewers and listeners to receive diverse viewpoints is achieved by guaranteeing them the right to receive speech unencumbered by government intervention. The *Red Lion* decision, however, apparently views the notion that broadcasters should come within the free press and free speech protections of the First Amendment as antagonistic to the interest of the public in obtaining access to the marketplace of ideas. As a result, it is squarely at odds with the general philosophy underlying the First Amendment, *i.e.*, that the individual's interest in free expression and the societal interest in access to viewpoint diversity are both furthered by proscribing governmental regulation of speech. The special broadcast standard applied by the Court in *Red Lion*, which sanctions restrictions on speakers in order to promote the interest of the viewers and listeners, contradicts this fundamental constitutional principle.[230]

4. First Amendment Standard Applicable to the Press

95. Under a traditional First Amendment analysis,[231] the type of governmental intrusion inherent in the fairness

230 *See 1985 Fairness Report*, 102 FCC 2d at 153 n.39.

231 *See supra* 91.

doctrine would not be tolerated if it were applied to the print media.[232] Indeed, in *Miami Herald Publishing Co. v. Tornillo*,[233] the Supreme Court struck down, on First Amendment grounds, a Florida statute that compelled a newspaper to print the response of a political candidate that it had criticized. Invoking a purpose strikingly similar to the fairness doctrine, the state had attempted to justify the statute on the grounds that the "government has an obligation to ensure that a wide variety of views reach the public."[234] The Court reasoned that the mechanism employed by the state in implementing this objective, however, was "governmental coercion,"[235] and thus contravened "the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years."[236] The Court also found that a governmentally imposed right of reply impermissibly "intrud[ed] into the function of editors."[237] In addition, the Court stated that the inevitable result of compelling the press "to print that which it would not otherwise print"[238] would be to reduce the amount of debate on governmental affairs:

> Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted

232 The Supreme Court has specifically noted that the type of governmental regulation sanctioned by *Red Lion* and its progeny "has never been allowed with respect to the print media." *FCC v. League of Women Voters of California*, 468 U.S. at 377 (citation omitted).

233 418 U.S. 241 (1974).

234 *Id.* at 248 (footnote omitted).

235 *Id.* at 254.

236 *Id.*

237 *Id.* at 258.

238 *Id.* at 256.

> or reduced. Government-enforced right of access inescapably " 'dampens the vigor and limits the variety of public debate.' "[239]

Also, the fact that a newspaper could simply add to its length did not dissuade the Court from concluding that the access requirement would improperly intrude into the editorial discretion of the newspaper.[240]

96. Relying on *Tornillo*, the Court, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*,[241] recently determined that a state administrative order requiring a utility to place the newsletter of its opponents in its billing envelopes contravened the First Amendment.[242] "[B]ecause access was awarded only to those who disagreed with [the utility's] views and who are hostile to [the utility's] interests,"[243] Justice Lewis Powell, in the plurality opinion, expressed concern that "whenever [the utility] speaks out on a given issue, it may be forced . . . to help disseminate hostile views."[244] As a consequence, the regulation had the effect

---

239 *Id.* at 257, *quoting New York Times Publishing Co. v. Sullivan*, 376 U.S. at 279. Further, expressly noting that print journalists are not "subject to the finite technological limitations of time that confront a broadcaster . . ." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 256-57, the Court intimated that our regulations may produce even greater inhibitions than the "right to reply" statute invalidated in *Tornillo*.

240 *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 256-57.

241 106 S. Ct. 903 (1986). *See supra* note 227.

242 Like the fairness doctrine, the asserted governmental interest underlying the state administrative order was to promote access to diversity of opinions. The Court was unpersuaded that the legitimacy of the asserted governmental "interest in promoting speech by making a variety of views available to appellant's customers," *id.* at 914 (citation omitted), was sufficient to withstand a First Amendment challenge.

243 *Id.*. at 910.

244 *Id.* at 910. The plurality also determined that it was constitutionally impermissible for the state to require the utility "to associate with speech with which [it] may disagree." *Id.* at 911.

of reducing the free flow of information and ideas that the First Amendment seeks to promote. In evaluating the utility's First Amendment rights to be free from governmentally-coerced speech, the plurality expressly stated that it was irrelevant that the ratepayers, rather than the utility, owned the extra space in the billing envelopes. It asserted that the "forced association with potentially hostile views burdens the expression of views . . . and risks forcing [the utility] to speak where it would prefer to remain silent"[245] irrespective of who is deemed to own this extra space.[246]

97. We believe that the role of the electronic press in our society is the same as that of the printed press. Both are sources of information and viewpoint. Accordingly, the reasons for proscribing government intrusion into the editorial discretion of print journalists provide the same basis for proscribing such interference into the editorial discretion of broadcast journalists. The First Amendment was adopted to protect the people *not from journalists, but from government*. It gives the people the right to receive ideas that are unfettered by government interference. We fail to see how that right changes when individuals choose to receive ideas from the electronic media instead of the print media. There is no doubt that the electronic media is powerful and that broadcasters can abuse their freedom of speech. But the framers of

---

245 *Id.* at 913.

246 As the plurality explained:

> A different conclusion would necessarily imply that our decision in *Tornillo* rested on Miami Herald's ownership of the space that would have been used to print candidate replies. Nothing in *Tornillo* suggests that the result would have been different had the Florida Supreme Court decided that the newspaper space needed to print candidates' replies was the property of the newspapers' readers . . . . The constitutional difficulty with the right-of-reply statute was that it required the newspaper to disseminate a message with which the newspaper disagreed.

Id. at 913.

the Constitution believed that the potential for abuse of private freedoms posed far less a threat to democracy than the potential for abuse by a government given the power to control the press. We concur. We therefore believe that full First Amendment protections against content regulation should apply equally to the electronic and the printed press.

IV. CONCLUSION

98. The court in *Meredith Corp. v. FCC* "remand[ed] the case to the FCC with instructions to consider [Meredith's] constitutional arguments."[247] In response to the court's directive, we find that the fairness doctrine chills speech and is not narrowly tailored to achieve a substantial government interest. We therefore conclude, under existing Supreme Court precedent, as set forth in *Red Lion* and its progeny, that the fairness doctrine contravenes the First Amendment and thereby disserves the public interest. We have reached these determinations only after the most careful and searching deliberation. We believe, however, that the evidence presented in the recent fairness inquiry and the record in this proceeding leads inescapably to these conclusions. Each member of this Commission has taken an oath to support and defend the United States Constitution and, as the court in *Meredith v. FCC* stated, "to enforce a Commission-generated policy that the Commission itself believes is unconstitutional may well constitute a violation of that oath."[248] As a consequence, we determine that the editorial decision of station WTVH to broadcast the editorial advertisements at issue in this adjudication is an action protected by the First Amendment from government interference. Accordingly, we reconsider our prior determinations in this matter and conclude that the Constitution bars us from enforcing the fairness doctrine against station WTVH.

247 *Meredith Corp. v. FCC*, 809 F.2d at 874.

248 *Id.*

99. We further believe, as the Supreme Court indicated in *FCC v. League of Women Voters of California*, that the dramatic transformation in the telecommunications marketplace provides a basis for the Court to reconsider its application of diminished First Amendment protection to the electronic media. Despite the physical differences between the electronic and print media, their roles in our society are identical, and we believe that the same First Amendment principles should be equally applicable to both. This is the method set forth in our Constitution for maximizing the public interest; and furthering the public interest is likewise our mandate under the Communications Act. It is, therefore, to advance the public interest that we advocate these rights for broadcasters.

100. ACCORDINGLY, IT IS ORDERED, that the Motion for Leave to File Comments Out-of-Time of the American Civil Liberties Union and the Motion to Submit Late-Filed Comments filed by the Safe Energy Communication Council ARE GRANTED.

101. IT IS FURTHER ORDERED, that the Motion for Leave to File Supplement of Meredith Corporation IS GRANTED and the supplement IS ACCEPTED.

102. IT IS FURTHER ORDERED, that the Petition for Reconsideration filed by Meredith Corporation IS GRANTED to the extent indicated herein, and the Order adopted October 26, 1984 IS VACATED.

103. IT IS FURTHER ORDERED, that the complaint of the Syracuse Peace Council IS DENIED.

104. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.[249]

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico,
Secretary

249 As in any adjudicatory matter, this Order shall become effective on the day after the day it is released. 47 C.F.R. § 1.4(b).

APPENDIX

List of Commenting Parties

Accuracy-in-Media
American Advertising Federation
American Association of Advertising Agencies
American Civil Liberties Union
American Newpaper Publishers Association
American Society of Newspaper Editors
Anti-Defamation League of B'nai B'rith
Bronet, Lester Charles
Bunch, Virginia
CBS, Inc. (CBS)
Caruso, Rita M.
Cester, Judith
Demaree, Patrick
DeJager, Everett
Democratic National Committee, Democratic Congressional Campaign Committee, and Democratic Senatorial Campaign Committee
Dowd, Diane
Ellis, Houston
Erikson, Michael
Fisher Broadcasting
Freedom of Expression Foundation (FEF)
Group W
Holthaus, Robert
Jansa, M.A.
Jenkinson, Stanley
Landmark Legal Foundation
Meredith Corp. (Meredith)
Moore, Sally Anne
National Association of Broadcasters (NAB)
NBC., Inc.
New York State Consumer Protection Board

Office of Communications of the United Church of Christ; Communication Commission, National Council of Churches; Henry Geller and Donna Lampert
Pomery, June S.
Postrel, Virginia I.
Radio-Television News Directors Association (RTNDA), CBS, NAB, FEF, Gannettt Co., Inc. (Gannett), Gaylord Broadcasting Co. (Gaylord), Meredith, Multimedia, Inc., Post-Newsweek Stations, Inc. and Society of Professional Journalists, Sigma Delta Chi
RTNDA, Gannett, and Gaylord
Rochester Committee for Broadcasting
Safe Energy Communication Council
Schultz, Connie
Spielberg, Sol
Speech Communications Association
Spitzer, Jack
Swartsel, Laura
Syracuse Peace Council
Thiel, Paul
Thurston, Helen
United States Catholic Conference
Villadsen, L.A.
Vroon, Peter,
Wilkin Consulting Services